Supreme Court, U.S.
FILED

No. _____

06-986 JAN 2 - 2007

In The OFFICE OF THE CLERK
Supreme Court of the United States

THEO JENSEN,

Petitioner,

v.

CITY OF FIRCREST,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May a State Legislature enact a statute permitting the admissibility of forensic test evidence that fails to satisfy standards developed by the State and recognized by the State to be necessary to ensure the reliability and forensic acceptability of that evidence?

May a State Legislature enact a statute forbidding an accused from challenging the admissibility of forensic test evidence that fails to satisfy standards developed by the State and recognized by the State to be necessary to ensure the reliability and forensic acceptability of that evidence?

May a State Legislature enact a statute permitting prosecution and conviction of citizens based solely on forensic test evidence that fails to satisfy standards developed by the State and recognized by the State to be necessary to ensure the reliability and forensic acceptability of that evidence?

Does a statute enacted by a State Legislature that has these characteristics violate the Due Process Clause of the Fourteenth Amendment by affirmatively exempting forensic test evidence from the requirement that evidence must exhibit some minimum indicia of reliability before it can be relied upon to deprive a citizen of his liberty?

Does a statute enacted by a State Legislature that has these characteristics violate the Due Process Clause of the Fourteenth Amendment by being fundamentally unfair and/or so indifferent to an individual's liberty interest as to shock the conscience?

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OPINION BELOW

The opinion of the Washington Supreme Court is reported at ___ Wn.2d ___, 143 P.3d 776 (Wash. 2006), and is attached at Appendix A. The Washington Supreme Court heard the case on direct review from the trial court. The order of the trial court is unpublished.

JURISDICTION

The Washington Supreme Court issued its opinion on October 5, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents questions under the Due Process Clause of the Fourteenth Amendment which states in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Mr. Jensen challenges the constitutionality of RCW 46.61.506(4) under the Fourteenth Amendment.

STATEMENT OF THE CASE

I. Substantive Facts

On March 22, 2004, the Washington Legislature enacted Substitute House Bill 3055, codified in relevant part at RCW 46.61.506(4). App. D. On October 23, 2004 Officer LaTour observed Theo Jensen driving 49 mph in a 35 mph zone in the City of Fircrest. App. H9. He stopped Mr. Jensen and smelled alcohol. App. H9. He arrested Mr. Jensen for Driver Under Twenty-One Consuming Alcohol, RCW 46.61.503. App. H1, H10. Mr. Jensen's subsequent breath test yielded results of .043 and .042. App. H12.

II. Trial Court

The City charged Mr. Jensen under RCW 46.61.503. App. G1, H1. A person is guilty of this offense if he is under 21 and has operated a car with "an alcohol concentration of at least 0.02 . . . as shown by analysis of the person's breath . . . made under RCW 46.61.506." RCW 46.61.503(1)(b). Mr. Jensen moved to suppress the breath test, challenging the constitutionality of RCW 46.61.506(4) on Federal Due Process grounds. The court denied the motion and entered written conclusions of law. App. B. Although Mr. Jensen claimed to be wearing a tongue ring at the time of his test, which would have necessitated suppression of the results, he was precluded from raising this challenge by the newly adopted provision. App. M5. Mr. Jensen stipulated to facts, submitted to a bench trial and was convicted under RCW 46.61.503 on the sole basis that his breath test results exceeded .02 BAC. App. G, H and I.

III. Washington State Supreme Court

Mr. Jensen argued that RCW 46.61.506(4) violated the Due Process Clause of the Fourteenth Amendment by providing for the admissibility of, and conviction based solely upon, forensic breath test evidence the State recognizes does not satisfy the minimum standards developed by the State, and which are recognized by the State to be necessary to ensure the reliability and forensic acceptability of that evidence. App. A16. The Court rejected the argument explaining:

> The courts need not assess the reliability of the scientific evidence . . . The appellant argues that under the federal and state constitutions, he is entitled to a fair trial, including a right to be convicted by reliable evidence. He argues that SHB 3055 violates his rights because it admits unreliable evidence . . . The appellant's argument is without merit . . . [The Act] does not . . . offend due process as embodied in both the state and federal constitutions.

App. A13-A17.

REASONS FOR GRANTING PETITION

The Washington Supreme Court decided an important question of federal law that has not been, but should be, specifically settled by this Court, and which conflicts with other generally relevant decisions of this Court. The decision of the State Court also conflicts with the decisions of another state court of last resort. This satisfies the general criteria for granting certiorari from a decision of a state court of last resort. U.S.Sup.Ct. Rule 10(b), (c); *Bullington v. Missouri*, 451 U.S. 430, 431 (1981).

I. Summary Of Arguments

RCW 46.61.506(4) permits admissibility of forensic breath test evidence that fails to satisfy standards developed by the State, and which are recognized by the State to be necessary to ensure the reliability and forensic acceptability of that evidence. It also precludes an accused from challenging the admissibility of this evidence even where it is known not to satisfy the standards developed by the State and recognized by the State to be necessary to ensure the reliability and forensic acceptability of that evidence. Finally, it permits prosecution and conviction of citizens based solely on such tests even where known not to satisfy the standards developed by the State and recognized by the State to be necessary to ensure the reliability and forensic acceptability of that evidence.

Under the Fourteenth Amendment, before forensic breath test evidence can be admitted to a jury, an accused has the right to have the State present evidence of compliance with those standards developed by the State and recognized by the State to be necessary to ensure the reliability and forensic acceptability of that test. Due process requires both that the evidence used in a prosecution contain some minimum indicia of reliability and that each accused be afforded fundamental procedural fairness. RCW 46.61.506(4) deprives the accused of both of these

protections and therefore is violative of the Due Process Clause of the Fourteenth Amendment.

II. The State Court Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Specifically Settled By This Court, And Which Conflicts With Other Generally Relevant Decisions Of This Court.

A. Due Process And Evidence Generally – The Fourteenth Amendment commands that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. This guarantee "operates to extend to the citizens and residents of the states . . . protection against arbitrary state legislation affecting life, liberty, and property." *Hibben v. Smith*, 191 U.S. 310, 325 (1903); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Under it, "[i]t is manifest that it was not left to the legislative power to enact any process which might be devised. [Due process] is a restraint on the legislative . . . powers of the government, and cannot be so construed as to leave [the legislature] free to make any process 'due process of law,' by its mere will." *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 276 (1855); *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 457 (1962).

The question is whether the statute under consideration is in accord with those procedures deemed "necessary to an Anglo-American regime of ordered liberty." *Duncan v. State of La.*, 391 U.S. 145, 149 n.14 (1968). "[F]air play . . . is the essence of due process." *Galvan v. Press*, 347 U.S. 522, 530 (1954). Due process is violated where state actions "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples." *Rochin v. California*, 342 U.S. 165, 169 (1952). This includes actions resulting "in a denial of fundamental procedural fairness" or which exhibit indifference of such magnitude that it shocks the conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 845-6, 850-2 (1998).

"[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." *Williams v. Illinois*, 399 U.S. 235, 239 (1970). "In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science . . . duly mindful of reconciling the needs both of continuity and of change in a progressive society." *Rochin* at 172. Even though a particular practice has been historically accepted "[t]echnological change or a refinement in our sense of justice may make their retention intolerable." Walter Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 6 (1956); *Jackson v. Denno*, 378 U.S. 368, 390 (1964).

"[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including [those pertaining to] evidence.'" *Patterson v. New York*, 432 U.S. 197, 201 (1977). "[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area." *Medina v. California*, 505 U.S. 437, 445-6 (1992). Nonetheless, criminal proceedings in state courts are still subject to the guarantee of due process contained in the Fourteenth Amendment. *Bartkus v. People of State of Ill.*, 359 U.S. 121, 124 (1959).

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. People of State of California*, 314 U.S. 219, 236 (1941). "In applying the fundamental fairness standard, the [Court looks] not only to historical practice, but also to the logical implications of a basic principle of fairness." Jerold Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS L.J. 303,

423 (2001). When demanded by "fundamental principles of liberty and justice," even long accepted practices must be abandoned and new ones mandated. *Powell v. State of Ala.*, 287 U.S. 45, 63 (1932).[1]

"[A] primary function of legal process is to minimize the risk of erroneous decisions." *Mackey v. Montrym*, 443 U.S. 1, 7 (1979). In general, "due process [is] meant to protect persons ... from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

In a state criminal prosecution, not only is an individual's "interest in the accuracy of a criminal proceeding ... almost uniquely compelling," but the state also has a significant "interest in the fair and accurate adjudication of criminal cases." *Ake v. Oklahoma*, 470 U.S. 68, 78-9 (1985). Accordingly, due process analysis tends to "focus on the value of adjudicatory fairness ... looking primarily to protect against the conviction of the innocent."[2] Israel, *supra*, at 397 and n.549; *Cf.*, *U.S. v. Nobles*, 422 U.S. 225, 230 (1975). Practices that directly threaten the accuracy of the fact-finding process betray this concern and generally run afoul of due process requirements.[3] *Thompson v. Louisville*, 362 U.S. 199 (1960); *Tot v. United States*, 319 U.S. 463 (1943); *Mooney v. Holohan*, 294 U.S. 103 (1935).

The Fourteenth Amendment leaves states free to adopt rules of evidence governing criminal prosecutions. *Lisenba* at 236. As with all other phases of criminal proceedings, however, these rules and their enforcement are not exempt from the requirements of due process. *Id.*; *see also*, *Holmes v. South Carolina*, __ U.S. __, 126 S.Ct. 1727, 1728 (2006); *Montana v. Egelhoff*, 518 U.S. 37, 53

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[1] *Cooper v. Oklahoma*, 517 U.S. 348 (1996) (pretrial hearing on competence); *Jackson v. Denno*, 378 U.S. 368 (1964) (pretrial determination of voluntariness of confession.).

[2] *State v. Michaels*, 642 A.2d 1372, 1381 (N.J. 1994).

[3] *State v. Ferguson*, 2 S.W.3d 912, 914 n.3 (Tenn. 1999).

(1996); *Dutton v. Evans*, 400 U.S. 74, 223 and n.4 (1970) (Blackmun, J., concurring). The Fourteenth Amendment sets limits on the rules of evidence that may be enacted by a state legislature. *Tot* at 467. Whether state evidentiary procedures violate due process standards generally rests on one of two factors: reliability and/or fairness.

An individual's right to a fair trial is in part contingent upon his ability to present "competent, reliable evidence." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). "State ... Governments [also] unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial." *U.S. v. Scheffer*, 523 U.S. 303, 309 (1998). In fact, "[t]he integrity of the adversary process [itself] depends both on the presentation of reliable evidence and the rejection of unreliable evidence."[4] *Taylor v. Illinois*, 484 U.S. 400, 414-5 (1988). Accordingly, "[r]eliability is ... properly a due process concern." *White v. Illinois*, 502 U.S. 346, 363-4 (1992) (Thomas, J., concurring).

Due process does not permit a conviction based on evidence lacking the requisite degree of reliability. *California v. Green*, 399 U.S. 149, 163 n.15 (1970); *Green,* 399 U.S. at 186 n.20 (Harlan, J., concurring). For this reason, "reliability is the linchpin in determining the admissibility" of evidence under the Fourteenth Amendment.[5] *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). To satisfy due process, evidence admitted against a defendant must carry some minimum indicia of reliability. *Manson* at 114; *Moore v. Illinois*, 434 U.S. 220, 227 (1977); *Neil v. Biggers*, 409 U.S. 188, 198 (1972); *Cf., Townsend v. Burke,* 334 U.S. 736, 741 (1948). Due process requires that evidence be excluded where it is "essential to safeguard the integrity of

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[4] *Bolden v. State*, 967 S.W.2d 895, 899 (Tex. App. 1998).

[5] *Michaels*, note 2 ("reliable evidence remains at the foundation of a fair trial ... If crucial inculpatory evidence is alleged to have been derived from unreliable sources due process interests are at risk.").

the truth-seeking process."[6] *Brewer v. Williams*, 430 U.S. 387, 425 (1977) (Burger, J., dissenting); *Moore* at 227.

The unique significance placed on the reliability of forensic evidence is illustrated by the principle, enunciated in *Scheffer*, that even a defendant's right to present a defense under the Constitution may be superseded by the need to ensure that evidence presented to a jury is sufficiently reliable.[7] In *Scheffer*, the defendant challenged a rule placing a blanket prohibition on the introduction of polygraph evidence at trial. He presented evidence concerning the reliability of polygraph tests and argued that his rights under the Fifth and Sixth Amendments included the right to present the results of such tests. The Court found that the blanket exclusion did "not unconstitutionally abridge the right to present a defense." *Scheffer* at 317.

The Court pointed out that "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." *Scheffer* at 308. It then made clear that among the proper basis for such a restriction was the state's legitimate interest in "ensuring that only reliable evidence is introduced at trial" and that "the exclusion of unreliable evidence is a principal objective of many evidentiary rules."[8] *Id.* at 309. Although acknowledging the evidence presented by the defendant in favor of polygraph testing, the Court noted "there is simply no consensus that polygraph evidence is reliable." *Id.* It then concluded that "[a]lthough the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors," the rule "excluding polygraph evidence in all

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[6] *Michaels*, note 2.

[7] *State v. Shuler*, ___ N.E.2d ___, NO. 05CA8 at 2 (Ohio App. 2006) ("lack of evidential reliability provides a basis for excluding [portable breath test] results from admissibility at trial.").

[8] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) ("trial judge must ensure . . . scientific testimony or evidence admitted is . . . reliable.").

. . . trials is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence." *Id.* at 312.

It is also well "established that the fourteenth amendment forbids 'fundamental unfairness in the use of evidence whether true or false.'" *Blackburn v. State of Ala.*, 361 U.S. 199, 206 (1960). The aim is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence regardless of its truth value. *Id.*; *Denno* at 376. Due process is violated where a practice fails to adhere to those "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." *U.S. v. Lovasco*, 431 U.S. 783, 790 (1977); *Brown v. State of Mississippi*, 297 U.S. 278, 286 (1936).

Due process represents "a profound attitude of fairness between . . . the individual and government." *Lankford v. Idaho*, 500 U.S. 110, 121 (1991). "Every procedure which . . . might lead [a judge] not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927). Each state's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . while [the state] may strike hard blows, [it] is not at liberty to strike foul ones. It is as much [its] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. U.S.*, 295 U.S. 78, 88 (1935).

"The principle that a State may not knowingly use false evidence . . . to obtain a tainted conviction [is] implicit in any concept of ordered liberty." *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959). Thus, practices which permit convictions based on knowingly false or misleading evidence, even if not solicited, violate a defendant's rights under the Fourteenth Amendment. *Id.* at

269; *Alcorta v. State of Tex.*, 355 U.S. 28, 31-2 (1957); *Mooney* at 112-3.

Under the fundamental fairness prong, a citizen's Fourteenth Amendment rights are also "abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes* at 1731; *Rock v. Arkansas*, 483 U.S. 44, 58 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 297, 303 (1973). This includes statutes that establish "arbitrary" evidentiary standards that favor the state but yield results contrary to what the nature of the evidence would otherwise dictate under the rules of evidence. *Washington v. Texas*, 388 U.S. 14, 24-5 (1967) (Harlan, J., concurring). While this does not bar states from enacting provisions that have the incidental "*effect* of making it easier . . . to obtain convictions, an evidentiary rule whose sole *purpose* is to boost the State's likelihood of conviction distorts the adversary process." *Egelhoff* at 68 (O'Connor, J., dissenting). The "Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State." *Wardius v. Oregon*, 412 U.S. 470, 475-6 (1973). The State may not insist that trials be run as a "search for truth" so far as defense evidence is concerned, while granting the prosecution the advantage of using evidence as if part of a "poker game": this is "fundamentally unfair." *Id.*

Finally, it is well established that once jurors have been exposed to damning evidence, it is difficult, if not impossible, to keep it from entering their minds during deliberations.[9] *Denno* at 388. As a result, issues of admissibility under the Fourteenth Amendment are solely within the province of the trial judge and should be determined outside the presence of the jury. *Id.* at 389-94; *Lego*

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[9] *State v. Haley*, 689 A.2d 671, 674 (N.H. 1997) ("private interest affected by a pretrial hearing on the admissibility of evidence is important . . . conviction may hinge on the admission or exclusion of certain evidence.").

v. Twomey, 404 U.S. 477, 489-90 (1972). Moreover, a statute establishing a per se rule in such proceedings, precluding a judge from considering evidence presented by the defendant concerning the reliability of the evidence sought to be introduced at trial, may well run afoul of the dictates of due process. *Rock* at 56-7 and n.12.

B. Due Process And Forensic Breath Test Evidence In Prosecutions For DUI – This Court has addressed the admissibility of forensic breath test evidence in the context of a prosecution for DUI on only one prior occasion. *California v. Trombetta*, 467 U.S. 479 (1984). The question before the Court was whether the Fourteenth Amendment demanded that states preserve breath samples for defendants. *Id.* at 481. Although *Trombetta* is not directly on point, the Court made several relevant observations.

First, it recognized that "[u]nder the Due Process Clause of the Fourteenth Amendment, [DUI] prosecutions must comport with prevailing notions of fundamental fairness . . . protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." *Trombetta* at 485. It then determined that this included evidentiary protections beyond simple "protection against perjury." *Id.* Finally, after discussing the particular procedures employed in obtaining the breath tests under consideration, the Court commented:

> The materiality of breath samples is directly related to the reliability of the Intoxilyzer itself. The degree to which preserved samples are material depends on how reliable the Intoxilyzer is. This correlation suggests that a more direct constitutional attack might be made on the sufficiency of the evidence underlying the State's case. After all, if the Intoxilyzer were truly prone to erroneous readings, then Intoxilyzer results without more might be insufficient to establish guilt beyond a reasonable doubt.

Trombetta at 489 n.10.

In a prosecution for DUI, forensic breath "test results are 'virtually dispositive of guilt or innocence.'" *Mack v. Cruikshank*, 2 P.3d 100, 104 (Ariz. App. 1999).[10] This is so even where the state is not prosecuting under the *per se* prong of a DUI statute because most jurors "would conclude that a person with [a] reading [in excess of the *per se* limit] was intoxicated when it was taken, in the absence of substantial evidence to the contrary." *State v. McElroy*, 568 So.2d 1016, 1016-7 (La. 1990) (Dennis, J., concurring). "Since the presentation of countervailing evidence would be necessary to dissuade the fact-finder of the defendant's guilt, the effect of introducing [breath test] evidence [is that] The burden of proof is shifted to the defendant." *Id.* Absent countervailing evidence, "[a] citizen's right to drive, and sometimes to liberty, will depend on the verdict of a machine."[11] *State v. Garthe*, 678 A.2d 153, 158 (N.J. 1996).

As a result of these considerations, "due process requires that the state ensure that the tests it demands drivers submit to produce reasonably accurate results." *Mack* at 104. Although a state may enact statutes governing the admissibility of breath test evidence, "the court must ascertain whether the statute[s] . . . establishing the reliability of breath testing . . . are contrary to due process." *Meehan v. Kansas Dept. of Revenue*, 959 P.2d 940, 943 (Kan. App. 1998). "[C]onstitutional due process clearly requires courts to take a hard look at the admissibility of scientific test evidence that is regularly used against citizens in criminal and administrative cases by the

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[10] In the case at bar, the breath test result was dispositive under RCW 46.61.503. *See also*, *State v. Jayne*, 24 P.3d 920, 926 (Or. App. 2001) ("[G]iven the significant weight that a jury is likely to accord this type of evidence (urinalysis test) the potential for prejudice . . . is high.").

[11] "[S]cientific proof may . . . assume a posture of mystic infallibility in the eyes of a jury of laymen." *U.S. v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974).

State." *Cf.*, *State v. Dilliner*, 569 S.E.2d 211, 224 (W.Va. 2002) (Starcher, J., concurring) (HGN).

"In order for the results of a blood alcohol test to be admissible [then], the state must prove that the reliability of the test satisfies due process and fairness." *State v. Honeyman*, 560 So.2d 825, 829 (La. 1990). Due process grants to each defendant the right to have the state demonstrate conformity with standards of testing and administration that produce a "residuum of competent evidence of reliability of the breath test." *Layton City v. Peronek*, 803 P.2d 1294, 1300 (Utah App. 1990).

Even assuming appropriate standards, when "a defendant takes issue with the qualifications of the technician, the quality of the testing machine, or the maintenance of the equipment, and so forth, the court, in the interest of due process and fairness, may well be entitled to bar the evidence." *State v. McElroy*, 553 So.2d 456, 458 n.1 (La. 1989). "Due process requires proof that the test was properly conducted." *Com. v. Lucarini*, 8 Pa. D. & C.3d 679, 684 (Pa. Com. Pl. 1977). "There are very basic due process problems involved in introducing blood alcohol tests that were not taken in conformity with [proper] guidelines for admissibility [enacted] to ensure the reliability and accuracy of scientific tests that in themselves resolve the question of guilt and innocence." *McElroy*, 568 So.2d at 1016. Where proper protocols have not been followed, "one cannot say that the test results are so reliable as to satisfy due process and fairness." *State v. Busby*, 893 So.2d 161, 167 (La. App. 2005).

As one Court noted with respect to evidence of intoxication:

> . . . it must be recognized that thousands of [motorists] are criminally and civilly prosecuted for DUI each year; and most of them are of modest means. Some do not have lawyers, and even if they do, the vast majority of accused drivers cannot afford scientific experts to challenge . . . evidence of intoxication . . . Under these conditions,

> where liberty and valuable property interests are at stake, our legal system has a particularly strong "basic fairness" obligation to see that the evidence that is regularly used by the State in these proceedings, where most defenses must necessarily be limited in time and cost, meets a threshold of well-established scientific reliability.

Dilliner at 223-4 (Starcher, J., concurring).

"Reliability is a due process issue . . . with respect to the state's [breath] testing." *Mack* at 105.

C. Forensic Breath Test Evidence In Washington Prior To Enactment Of RCW 46.61.506(4) – Nearly half a century ago Washington recognized that the State must establish that a breath test "machine was properly checked and in proper working order at the time of conducting the test [and] that the chemicals employed were of the correct kind and compounded in the proper proportions . . . [or] the result of the test [would be] wholly unreliable." *State v. Baker*, 355 P.2d 806, 809-10 (Wash. 1960).

In 1968, Washington citizens approved Initiative 242 ("I-242"). App. E. Section 3, codified at RCW 46.61.506(3), reads:

> Analysis of the person's blood or breath to be considered valid under the provisions of this section . . . shall have been performed according to methods approved by the state toxicologist . . . The state toxicologist is directed to approve satisfactory techniques or methods . . .

RCW 46.61.506(3); *State v. Felix*, 479 P.2d 87, 88-9 (Wash. 1971).

"Through enactment of initiative 242, the people intended to allow the results of tests to be admitted under certain prescribed safeguards." *Felix* at 90. These safeguards were meant to ensure that all such evidence would be "reliable," "scientific and probative." *State v. Parker*, 558 P.2d 1361, 1363 (Wash. 1976); *Nowell v. State Dept. of Motor Vehicles*, 516 P.2d 205, 206-7 (Wash. 1973). Moreover, the

people explicitly chose to place the "authority . . . to prescribe approved methods for maintaining and administering Breathalyzer tests" in the hands of the State's highest expert on such matters, "the State toxicologist." *State v. Peterson*, 674 P.2d 1251, 1253 (Wash. 1984); *Felix* at 89-90.

Under these provisions, "the ultimate concern of the judiciary is that the methods approved result in an accurate test, competently administered, so that a defendant is assured that the test results do in fact reflect a reliable and accurate measure of his or her breath content." *State v. Ford,* 755 P.2d 806, 809-10 (Wash. 1988). "If the citizens of the State of Washington are to have any confidence in the breath-testing program, that program has to have some credence in the scientific community as a whole." *City of Seattle v. Clark-Munoz*, 93 P.3d 141, 145-6 (Wash. 2004) (*quoting*, District Court Panel).

The procedures promulgated by the Toxicologist are "based on currently accepted scientific principles and practices in the field of breath alcohol testing." WAC 448-13-010 (*repealed* Oct. 23, 2004). They "are intended to implement the directive of the statute by . . . identifying . . . individuals . . . to . . . maintain [testing] equipment, and . . . identifying certain aspects of the operation of [the] equipment, necessary for reliable testing." WAC 448-16-010. They "ensure the highest possible confidence in the Breath Testing Program."[12] "Deviation [from promulgated standards] may be justified where . . . the scientific integrity of the procedure, the instrument, the program or any breath alcohol measurement is not compromised."[13] The Toxicologist's purpose for promulgating these standards is "to prescribe a method for administering a breath test that accords with principles accepted in the scientific community

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[12] App. J2 – WASHINGTON STATE PATROL BREATH TEST SECTION, *Policy and Procedure Manual*, I (2005).

[13] App. J2.

and, when followed, produces a valid test." *City of Seattle v. Allison*, 59 P.3d 85, 89 (Wash. 2002).

The Toxicologist has recognized that "an *accurate and reliable* breath test requires a good instrument, program and protocol."[14] In this context, "the following are required for an *accurate and reliable* breath test . . . an instrument in proper working order [which has been] properly calibrated."[15] "'Calibration' is the process of standardizing the DataMaster instrument to a known ethanol vapor concentration using a certified simulator solution. This allows for the quantitative measurement of the ethanol concentration in a person's breath."[16] The Toxicologist has promulgated a two page protocol detailing how a DataMaster is to be calibrated.[17]

Another measure promulgated by the Toxicologist to ensure the reliability of state breath tests is the performance of a Quality Assurance Procedure ("QAP") on each DataMaster:[18] "*Prior to . . . being installed in the field for evidentiary use*" and "*At least once every year.*"[19]

> The Quality Assurance Procedure ensures the accuracy, precision and forensic acceptability of the DataMaster instrument for the purpose of quantitatively measuring the alcohol concentration of a person's breath. The Procedure evaluates critical systems within the instrument to ensure their compliance with strict pre-determined criteria.

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[14] App. L1 – WASHINGTON STATE PATROL BREATH TEST SECTION, *Training Outline For DataMaster and PBT, Operator Basic*, 27 (2004).

[15] App. L1; Patrick Harding, *Methods for Breath Analysis*, *in* MEDICAL-LEGAL ASPECTS OF ALCOHOL 185, 187 (James Garriott ed., 4th ed. 2003) (Calibration of breath test machine is critical.).

[16] App. J3.

[17] App. J3-J4.

[18] The DataMaster and DataMaster CDM are approved for breath testing in Washington. WAC 448-16-020(1).

[19] App. J5.

> When complying with the standards required in the Quality Assurance Procedure, the DataMaster can be confidently placed in the field for evidential use.[20]

The protocol governing the QAP is six pages long and tests the accuracy and precision of each DataMaster as well as other critical analytical components meant to ensure reliability.[21]

Finally, the Toxicologist has promulgated strict protocols for the preparation and use of simulator solutions.[22] The purpose of the simulator:

> is to simulate a breath alcohol sample . . . it contains a solution of alcohol and water that . . . can produce a known vapor alcohol concentration and it can be used as a calibrating device and as a testing device when . . . testing a breath test, any type of breath test instrument. Simulators are typically the standard for testing the calibration. The solutions are received from the state toxicology laboratory, and are used for certification purposes.

State v. Straka, 810 P.2d 888, 894 (Wash. 1991).

"[T]he simulator protocol relates to accuracy of breath testing, [an] evidentiary concern[]." *Straka* at 893. "The simulator test is of particular significance in certification of the DataMaster machine, and in the machine's self-testing of calibration which it goes through each time a breath alcohol analysis is performed in accordance with procedures in the WACs." *Id.* If the DataMaster cannot return the correct value for the simulator solution, then it

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[20] App. J5; Harding, note 15 at 189 (Failure to perform QAP "jeopardizes the reliability of the testing result.").

[21] App. J5-J14.

[22] App. K – WASHINGTON STATE TOXICOLOGY LABORATORY, *Procedure For The Preparation Of .08 Simulator External Standard Solution For Use With A Breath Test Instrument* (2005); App. J15-J17.

cannot be expected to return an accurate value on a breath test administered to a motorist. "Obviously, the simulator solution is key to simulator testing." *Id.* at 894.

Once placed in the field, however, the alcohol concentration of the solution decreases through evaporation.[23] This means that if a solution has a vapor concentration of .08 on day 1, it will continue to decrease to concentrations less than .08 as time passes. Nonetheless, regardless of what the true vapor concentration is at a given time, the simulator check will be deemed satisfied if it returns any value between .072 and .088. WAC 448-16-050. While this naturally allows for some inherent error, the Toxicologist has determined that as long as proper protocols are adhered to this error can be minimized.

A major problem could occur, however, if simulator solutions were left in the field for an indeterminate period of time allowing their vapor alcohol concentration to sink much below these levels. In that case, a reference test might report a value of .088, which would be deemed correct under the regulations, but the actual vapor concentration of the solution would be much lower than that so the DataMaster would be grossly over-estimating alcohol concentration. This could occur if the DataMaster has fallen out of calibration. In this case, the DataMaster would report vastly inflated BAC values for motorist's tested on that machine. To ensure that use of the simulator solution remains an effective safeguard against such possibilities, the Toxicologist has mandated that: "Solutions shall be changed at least every 60 days regardless of number of tests or measurement value."[24]

"These specifications demonstrate the toxicologist's concern to ensure accuracy." *City of Sunnyside v. Fernandez*, 799 P.2d 753, 755 (Wash. App. 1990). "[A]dherence to the protocols for evaluation and certification and the

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[23] App. K1.

[24] App. J15.

protocol for preparing and testing the simulator solution, when coupled with compliance with applicable WACs [regulations], produces scientifically reliable results." *Straka* at 893. Accordingly, for a test to have been admissible under RCW 46.61.506(3), "compliance with the [approved regulations and protocols was "required"] to assure accuracy and reliability of the test results." *Allison* at 91. This included having to introduce "proof [that the DataMaster] had been checked and calibrated." *State v. Watson*, 756 P.2d 177, 179 (Wash. App. 1988); *Peterson* at 1254.

There is more to this regime, however, than simply ensuring the reliability of test evidence. It reflects a judgment by the citizens of Washington concerning the fairness of the procedures involved. Three years prior to the passage of I-242 "the United States Supreme Court held . . . that the State can constitutionally force a defendant to submit to a blood alcohol or breathalyzer test." *State v. Bostrom*, 902 P.2d 157, 161 (Wash. 1995); *Schmerber v. California*, 384 U.S. 757 (1966). In response, the citizens of the State of Washington prohibited this as a general practice giving themselves the right to refuse to submit to a breath test through a provision of I-242 codified at RCW 46.20.308. *State v. Krieg*, 497 P.2d 621, 624 (Wash. App. 1972); *Parker* at 1363. It also provided that:

> Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration . . .

RCW 46.20.308.

Read together, RCW 46.20.308 and RCW 46.61.506(3) can be seen as encompassing several judgments made by the citizens of Washington. First, the administration of alcohol tests represents a significant intrusion into the

human body. *State v. Wetherell*, 514 P.2d 1069, 1073 (Wash. 1973).[25] Second, given the hazards caused by intoxicated drivers, a citizen's privilege to drive ought to be conditioned on his consent to such intrusions when properly requested. And, finally, given the significant bodily intrusion and the dire consequences that could befall a motorist who fails a breath test, that substantial precautions ought to be taken to ensure that the breath test consented to is both "scientific," *Parker* at 1363, and "reliable," *Nowell* at 206-7, as determined by the State's highest expert on such matters, "the State toxicologist." *Peterson* at 1253; *Felix* at 89-90. This final judgment evidences what the citizens of Washington deemed necessary to guarantee fairness in the administration and use of breath tests as evidence of guilt in a criminal proceeding.[26]

D. Forensic Breath Test Evidence In Washington After Enactment Of RCW 46.61.506(4) And The Denial Of Due Process – The only element of the crime Mr. Jensen was charged with that is in dispute is whether he had "an alcohol concentration of at least 0.02 . . . as shown by analysis of [his] breath . . . made under RCW 46.61.506." RCW 46.61.503. Thus, the results of Mr. Jensen's breath test are necessarily and solely determinative of a finding of guilt or innocence.

Passage of SHB 3055 left RCW 46.61.506(3) intact but added a new section 4 reading:

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[25] *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Holland v. Parker*, 354 F.Supp. 196, 199 (D.S.D. 1973).

[26] Under Washington Constitution, "the people in their legislative capacity are superior to all other branches of government." *State v. Superior Court In and For Thurston County*, 159 P. 92, 95 (Wash. 1916). "[D]eliberate efforts by a legislative body to circumvent the initiative or referendum rights of an electorate will not be looked upon favorably." *Citizens for Financially Responsible Government v. City of Spokane*, 662 P.2d 845, 852 (Wash. 1983).

> (4)(a) A breath test . . . shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:
>
> (See App. C2)
>
> (b) . . . In assessing whether there is sufficient evidence of the foundational facts, the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.
>
> (c) Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

RCW 46.61.506(4).

Through this provision:

> . . . the legislature adopts standards governing the admissibility of tests of a person's . . . breath. These standards . . . will reduce the delays caused by challenges to various breath test instrument components and maintenance procedures. Such challenges, while allowed, will no longer go to admissibility of test results. Instead, such challenges are to be considered by the finder of fact in deciding what weight to place upon an admitted blood or breath test result.

App. D2.

The first thing to note is that compliance with the provisions of RCW 46.61.506(3) is no longer required. "The

legislature has made clear its intention to make BAC test results fully admissible once the State has met its prima facie burden [under RCW 46.61.506(4)(a)]." *City of Fircrest v. Jensen*, 143 P.3d 776, 784 (Wash. 2006). Although the admissibility of the test may be challenged on some other grounds, any challenges to "the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures . . . shall not preclude the admissibility of the test." RCW 46.61.506(4)(c). "These provisions clearly preclude challenges to the admissibility of BAC test results on reliability and accuracy grounds once the requirements of subsection (4)(a) are met." *Jensen* at 795 (Sanders, J., dissenting).

Under section (4)(a), however, the State is no longer required to produce any evidence of instrument calibration, the performance of an annual QAP or even that the simulator solution used in a particular test has been replaced within the 60 days preceding the test (collectively hereinafter, "**Standards**").[27] (See App. C2). As illustrated above, though, these steps are recognized by the State Toxicologist as being critical to insuring a valid and reliable test. The Court's rejection of these **Standards** is particularly confusing given its concession that where "the reliability of the scientific evidence [is concerned, the Court] should defer to the judgment of scientists." *Jensen* at 783. These **Standards**, however, were established by the State Toxicologist, the State's highest scientific expert.

On the other hand, the statutory requirements were promulgated by a Legislature which never claimed any scientific expertise of its own or conducted any sort of inquiry on the matter. Moreover, the Court acknowledged the Legislature's desire to turn the clock back to before the *Clark-Munoz* decision *supra*, where it was recognized that "[i]f the citizens of the State of Washington are to have any

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[27] **Standards**: 1) annual calibration; 2) annual QAP; and 3) 60 day solution changes.

confidence in the breath-testing program, that program has to have some credence in the scientific community as a whole." *Jensen* at 782-3. Nonetheless, blithely stating that "courts need not assess the reliability of the scientific evidence," the Court concluded that RCW 46.61.506(4) does not offend due process because the argument that a citizen "is entitled to a fair trial, including a right to be convicted by reliable evidence . . . is without merit." *Id.* at 783-4.

The Court's decision defies reason. Reliance on breath test technology depends on the certitude offered by the application of tested scientific principles and practices to the analysis of breath alcohol. This certitude, however, may only be claimed if we adhere to those tested principles.[28] If we fail to adhere to them, the evidence obtained is no longer supported by science. The absurdity of allowing scientific tests to be used as evidence which fail to follow simple procedures *known by the State to be necessary* to ensure a scientifically valid and reliable result would undermine public confidence in the administration of government and justice itself.

This is not the first time a government has engaged in the practice of science by decree. Perhaps the most famous example is that of Galileo who was convicted for asserting, contrary to the law of the time, that the Earth revolved around the Sun. *State v. O'Key*, 899 P.2d 663, 678 n.21 (Or. 1995). Even more recently the Indiana State Legislature introduced a bill to define the value of pi.

> . . . the ratio between the diameter of a circle and the circumference of a circle is known as pi, and is equal to roughly 3.14159. It is a long decimal number that is hard to remember, so in 1897 the legislature of the State of Indiana decided that they would make life easier for high school students by

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[28] *Layton City v. Peronek*, 803 P.2d 1294, 1299-1300 (Utah App. 1990).

> passing a law that the value of pi would be 3.0 exactly.

141 Cong. Rec. H4690-4753 (daily ed. May 10, 1995) (statement of Rep. Zimmer).

As a measurable ratio, however, pi is what it is. Eric Weisstein, CRC CONCISE ENCYCLOPEDIA OF MATHEMATICS, (1999). Legislating its value is as absurd as passing "a law that the Earth is flat." Jan Gullberg, MATHEMATICS: FROM THE BIRTH OF NUMBERS, 95-6 (1997). Adopting the proposed value for pi would have forced "Detroit . . . to manufacture cars with elliptical [oval shaped] wheels." 133 Cong. Rec. E141-03 (1987) (statement by Arthur C. Clarke, scientist). One can imagine the bumpy ride that would result in and the likely fate of the U.S. automobile industry. The point is that the laws of nature cannot be changed by legislative fiat. Gullberg, *supra*, at 96.

Analogously, "the determination of . . . BAC by means of breath tests is a scientific process. [To be scientifically valid, each test] must be performed according to proper scientific practices and standards established by scientists with specific knowledge of the subject."[29] If they are not, the breath tests can have "no credence in the scientific community" and the citizens "no confidence in the State's breath-testing program."

Washington has explicitly named specific **Standards** it knows to be necessary to yield reliable test results. This has been done by the State's own expert on these matters: the State Toxicologist. Allowing the State to use tests without taking the time to demonstrate compliance with the basic scientific **Standards** recognized and developed by the State itself would raise grave "concerns regarding the reliability of evidence and affect the integrity of the truth-seeking process."

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[29] *Recommended Standards and Procedures of The Canadian Society of Forensic Science Alcohol Test Committee*, 36(3) SOC. FORENS. SCI. J. 101, 113 (2003).

The fact that we are speaking of scientific **Standards** recognized and developed by the State itself is what removes this from the realm of matters which go to weight as opposed to admissibility. When considering scientific standards that have been explicitly recognized by both the State and a defendant, there is no question of fact regarding their applicability for a jury to decide. Each of the provisions discussed above comes directly from pronouncements of the State Toxicologist in his role as chief scientist for the State in this area. Hence, with respect to these **Standards** there is no question of weight. The State already knows application of the **Standards** is a necessary prerequisite to a scientifically valid and reliable test. Accordingly, failure to require the State to produce some evidence of compliance with these **Standards** before a test is submitted to a jury for consideration deprives any test sought to be admitted of that *minimum indicia of reliability* required to satisfy due process.

Of greater concern is the fact that even if a defendant can produce conclusive proof that these **Standards** were not adhered to, the trial court is not permitted to consider that in determining the admissibility of the breath test. RCW 46.61.506(4) "clearly precludes challenges to the admissibility of BAC test results on reliability and accuracy grounds once [its] requirements . . . are met." *Jensen* at 795 (Sanders, J., dissenting). Thus, even where both parties and the trial court itself know that a breath test lacks the necessary foundation to establish its reliability, the State is permitted to, and the Court forced to allow, the unreliable evidence to be introduced to the jury and relied upon as a valid basis for a finding of guilt. This clearly deprives any test of that *minimum indicia of reliability* required to satisfy due process.

The natural reply is that the defendant can introduce his evidence or challenge the result at trial. Remember, however, that not every motorist in the State can afford to hire an expert to explain and establish the need for these **Standards** to a jury in the hopes of convincing the jury that they are necessary to ensure a valid and reliable test.

Further, as this Court has recognized, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993). Thus, this provides no guarantee that the lack of a foundational basis to establish the reliability of the test in question will be understood by the jury. Accordingly, failure to require the State to produce some evidence of compliance with these **Standards** before a test is submitted to a jury for consideration deprives any test sought to be admitted of that *minimum indicia of reliability* required to satisfy due process.

Even if an individual could afford to hire an expert to explain and establish the need for these **Standards** to a jury, why should he have to? Again, the statute makes admissible what may be conclusive evidence of guilt without requiring the State to demonstrate compliance with basic scientific **Standards** *developed by the State and recognized by the State to be necessary to ensure the reliability and forensic acceptability of that evidence.* By permitting the State to present this evidence while excusing it from having to provide any evidence that these **Standards** have been complied with, the Legislature is condoning the deprivation of individual liberty based solely on a test result from a machine *it knows* may not be scientifically reliable. This is akin to allowing the State to use misleading evidence *it knows* to consist of half truths and forcing a citizen to prove to the jury what both parties already know is required to reveal the full truth. Even where both parties and the trial court itself know that the **Standards** have not been satisfied, a citizen's fortunes are left to whether or not he is skillful enough to educate the jury concerning **Standards** the *State already knows* are required for reliability.

Is such a result justified by the Legislature's desire to "reduce the delays caused by challenges" to evidence failing to satisfy the minimum **Standards** recognized and developed by the State itself? Does it reflect the "profound attitude of fairness . . . between the individual and government" demanded by due process?

"[A] democratic government must . . . practice fairness." *Lankford* at 121. "If prosecutors are permitted to convict guilty defendants by [such] unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means. Courts must not permit this to happen, for when it does the freedom of each citizen is subject to peril and chance." *State v. Lavaris*, 707 P.2d 134, 136 (Wash. App. 1985). While judicial economy is a laudable goal, it must not be achieved by dispensing with such elementary safeguards of an individual's liberty. Such indifference to the potential loss of liberty by a citizen *shocks the conscience and is clearly fundamentally unfair* to all citizens of Washington. At a minimum, the *fundamental procedural fairness* mandated by due process requires that the State produce some evidence that it has followed those **Standards** *it knows* to be necessary to guarantee a scientifically valid and reliable test before that test is introduced to a jury.

Even if this Court were to determine that the **Standards** recognized and established by the State were not necessary and instead that the simple checklist contained in RCW 46.61.506(4)(a) was adequate to bestow the required indicia of reliability, the provision as a whole would still be violative of due process. This follows from the command that:

> In assessing whether there is sufficient evidence of the foundational facts [contained in the checklist of section a], the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.

RCW 46.61.506(4)(b).

Pursuant to this directive, in establishing the foundational requirements of the statute, no matter how weak the evidence presented by the State is or whether the defendant can conclusively establish that the State's evidence is false or even if the trial court in its judgment determines that the State's evidence is not credible, it must be assumed to be true.

This impacts not only the reliability of the evidence that will be permitted to go to the jury but the fundamental fairness of the proceedings themselves.

First, if even patently incredible evidence must be presumed to be true for purposes of establishing the admissibility of a breath test, there is virtually no hurdle whatsoever that the State must clear in establishing the reliability of the evidence it intends to introduce to the jury. Any conjecture, half-truth or fabrication, no matter how obviously untrustworthy, must be accepted as true. The legislature has substituted its judgment for that of the trial judge with respect to the credibility of witnesses and evidence in a particular matter even though it is not privy to who or what the witnesses and evidence are or what they have to say. Clearly such a determination, devoid of any knowledge of the facts and circumstances surrounding the administration of a particular test, cannot ensure that *minimum indicia of reliability* required by due process.

Second, the command to "assume the truth of the prosecution's . . . evidence and all reasonable inferences from it in a light most favorable to the prosecution" does not simply tip the balances in favor of the State, it brazenly does away with them all together. Given that the law clearly dictates that *Courts must accept as true all evidence submitted by the State* to establish the foundation for admissibility of a breath test, any motion by a defendant to refute that evidence becomes frivolous as it is no longer supported by law. CRLJ 11(a)(2). Thus, any attorney who attempts to challenge the admissibility of a breath test at this stage through evidence contradicting that being relied upon by the State, could be subject to sanctions simply for trying to ensure the reliability of the evidence. CRLJ 11(a). A more obvious "procedure . . . [requiring a judge] not to hold the balance nice, clear, and true between the state and the accused" cannot be imagined. This is clearly *fundamentally unfair* and denies the accused due process of law. *Tumey* at 532.

In the matter *sub judice*, Mr. Jensen claims to have been wearing a tongue ring at the time of his test which would have rendered the test results inadmissible under RCW 46.61.506(4)(a)(iii). The officer who administered the test, however, had indicated in his police report that he had performed the 15-minute mouth check prior to the test as required by the statute. Without more, the statute makes this conclusive proof for foundational purposes that Mr. Jensen was not wearing a tongue ring. Accordingly, a test which may have been unreliable even under the stripped down statutory requirements was found admissible. Moreover, given that the trial court found RCW 46.61.506(4) constitutional, counsel for Mr. Jensen was precluded from raising argument contradicting the State's evidence on this point for fear of being sanctioned under CRLJ 11. Accordingly, Mr. Jensen's due process rights to fundamentally fair procedural protections and to be tried by evidence containing some minimum modicum of reliability were denied.

The provisions of RCW 46.61.506(4) violate the Due Process Clause of the Fourteenth Amendment. The Washington Supreme Court decided an important question of federal law that has not been, but should be, specifically settled by this Court, and which conflicts with other generally relevant decisions of this Court. This satisfies the general criteria for granting certiorari from a decision of state court of last resort. U.S.Sup.Ct. Rule 10(c).

III. The Decision Of The State Court Conflicts With The Decisions Of Another State Court Of Last Resort.

The Washington Supreme Court held:

> The courts need not assess the reliability of the scientific evidence . . . The appellant argues that under the federal and state constitutions, he is entitled to a fair trial, including a right to be convicted by reliable evidence . . . The appellant's argument is without merit.

Jensen at 783-4.

This directly contradicts the conclusion of the Louisiana State Supreme Court which made clear that "[i]n order for the results of a blood alcohol test to be admissible, the state must prove that the reliability of the test satisfies due process and fairness." *Honeyman*, at 829; *McElroy* at 458 n.1. It also conflicts with the decisions of the appellate courts of at least four other states including Arizona, *Mack* at 104 ("due process requires that the state ensure that the tests it demands drivers submit to produce reasonably accurate results"), Kansas, *Meehan* at 943 ("the court must ascertain whether the statute[s] . . . establishing the reliability of breath testing . . . are contrary to due process"), Pennsylvania, *Lucarini* at 684 ("Due process requires proof that the test was properly conducted"), and Utah, *Peronek* at 1300 (Due process grants to each defendant the right to have the state demonstrate conformity with standards that produce a "residuum of competent evidence of reliability of the breath test").

Given these conflicting approaches and the split between two state courts of last resort, review by this Court is appropriate. U.S.Sup.Ct. Rule 10(b).

Respectfully submitted,

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APPENDIX A

143 P.3d 776

City of Fircrest v. Jensen Wash.,2006.
Supreme Court of Washington, En Banc.
CITY OF FIRCREST, Respondent,
v.
Theo JENSEN, Appellant.
No. 76738-6.

Argued Oct. 27, 2005.
Decided Oct. 5, 2006.

Linda Medeiros Callahan, Callahan Law, Shelton, Theodore Wayne Vosk, Attorney at Law, Bothell, for Appellant.

Michael Brian Smith, Attorney at Law, Tacoma, Pamela Beth Loginsky, Washington Assoc of Prosecuting Atty, Olympia, for Respondent.

Susan Sackett DanPullo, Office of the Atty. Gen., Olympia, for Amicus Curiae Wash. State Dept. of Licensing.

Shannon Elizabeth Inglis, Attorney General's Office, Seattle, for Amicus Curiae Wash. State Patrol.

C. JOHNSON, J.

¶ 1 This case involves a challenge to Substitute House Bill 3055[1] (SHB 3055), "AN ACT Relating to admissibility of DUI (driving under the influence of an intoxicant) tests; amending RCW 46.61.506; reenacting and amending RCW 46.20.308 and 46.20.3101; and creating a new section." Substitute H.B. 3055, 58th Leg., Reg. Sess. (Wash.2004).

[1] The act is also referred to by its session law number, Laws of 2004, ch. 68.

The appellant argues the act violates either the United States Constitution or the Washington Constitution by (1) including more than one subject in its title (2) not including the subject of the bill in its title (3) violating the doctrine of separation of powers and/or (4) violating due process by creating a mandatory rebuttable presumption. SHB 3055 took effect on June 10, 2004, and has been challenged in various municipal and district courts on similar grounds with varying results. In this case, the municipal court judge rejected all challenges to the act. We affirm.

FACTUAL AND PROCEDURAL HISTORY

¶ 2 On March 22, 2004, the legislature enacted SHB 3055. In the bill's first section, the legislature conveys its frustration with the inadequacy of previous attempts to curtail the incidence of DUI and sets a goal of ensuring swift and certain consequences for those who drink and drive. In section 2, the bill amends RCW 46.20.308, the implied consent statute, to allow police officers to obtain search warrants for a person's blood or breath, even if that person consents to the search. The bill also revises the warnings a police officer must give to a driver before conducting a breath or blood alcohol concentration test (BAC). These revisions were intended to reflect the then-current state of the law. Section 4 amends RCW 46.61.506 by codifying the foundational requirements for the admissibility of BAC test results and expands the list of people qualified to administer a blood test under RCW 46.20.308.

¶ 3 The facts giving rise to this claim are undisputed. During the early morning hours of October 23, 2004, appellant Theo Jensen was pulled over for speeding by a

city of Fircrest police officer. The officer noticed the smell of alcohol on Jensen's breath and proceeded to conduct field sobriety tests. Based on the results of the tests, the smell of alcohol on Jensen's breath, and the fact that Jensen had been speeding, the officer arrested Jensen and took him to the police station to conduct a BAC test. The BAC test results were 0.043 and 0.042, above the 0.02 legal limit for persons under the age of 21.

¶ 4 Jensen moved to suppress the test results on the grounds that SHB 3055 is unconstitutional. The municipal court heard arguments and ultimately denied the motion. Jensen was convicted of driver under 21 consuming alcohol, RCW 46.61.503. Jensen petitioned for direct review of his case under RAP 4.3.

ANALYSIS

¶ 5 We review challenges to the constitutionality of legislation de novo. The party challenging the legislation bears the burden of showing the legislation is unconstitutional. The appellant challenges SHB 3055 on three grounds. First, he argues the bill violates article II, section 19 of the Washington Constitution by either containing more than one subject in the title or not reflecting the subject of the bill in the title. Next, he argues the act violates the doctrine of separation of powers by allowing the legislature to usurp the power of the judiciary to determine the admissibility of evidence. Finally, he argues the substance of the act violates a defendant's due process rights to a fair trial.

I. ARTICLE II, SECTION 19

¶ 6 Article II, section 19 of the Washington Constitution reads, "No bill shall embrace more than one subject, and that shall be expressed in the title." This has been interpreted as creating two distinct prohibitions: first, no bill shall embrace more than one subject (the single-subject rule); and second, no bill shall have a subject not expressed in the title (the subject-in-title rule). *State ex rel. Citizens v. Murphy,* 151 Wash.2d 226, 249, 88 P.3d 375 (2004). This constitutional mandate serves three distinct purposes:

> (1) to protect and enlighten the members of the legislature against provisions in bills of which the titles give no intimation; (2) to apprise the people, through such publication of legislative proceedings as is usually made, concerning the subjects of legislation that are being considered; and (3) to prevent hodge-podge or log-rolling legislation. We have declared that when laws are enacted in violation of this constitutional mandate, the courts will not hesitate to declare them void.

Patrice v. Murphy, 136 Wash.2d 845, 851-52, 966 P.2d 1271 (1998) (quoting *State ex rel. Wash. Toll Bridge Auth. v. Yelle,* 32 Wash.2d 13, 24, 200 P.2d 467 (1948)). Violation of either the single-subject rule or the subject-in-title rule is sufficient to declare the relevant provisions of the bill unconstitutional. *Patrice,* 136 Wash.2d at 852, 966 P.2d 1271. Article II, section 19 is liberally construed in favor of upholding the challenged legislation. The burden is on the challenger to establish the bill's unconstitutionality beyond a reasonable doubt.

¶ 7 As a threshold matter, this court must first decide the relevant title of the act. As both parties note, there exists a line of cases establishing that when an act purports to amend a prior act, the relevant title to be examined under article II, section 19 is the title of the original act. *St. Paul & Tacoma Lumber Co. v. State,* 40 Wash.2d 347, 355, 243 P.2d 474 (1952).[2] Although this rule has never been expressly overruled, it has been called into question by its absence from more recent article II, section 19 challenges involving amendatory acts. *See, e.g., Fray v. Spokane County,* 134 Wash.2d 637, 952 P.2d 601 (1998) (in article II, section 19 challenge, only the title of the amendatory act was considered). Of the seven lower court rulings submitted by the appellant, four declined to follow *St. Paul* and analyzed the amendatory title of the act. The remaining three followed *St. Paul* and analyzed the title of the original act.

¶ 8 The appellant argues that *St. Paul* and its progeny are an anomaly and should be overruled here. They cite the language of article II, section 19 to assert that the words "[n]o bill" expresses the framers' intention that the mandate apply equally to both original and amendatory acts. The respondent argues only that the appellant has failed to meet its burden to overturn the *St. Paul* line of cases.

¶ 9 We agree with the respondent that the appellant has failed to show the *St. Paul* rule, requiring examination

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[2] This rule was affirmed in the following cases: *Keeting v. Pub. Util. Dist. No. 1,* 49 Wash.2d 761, 306 P.2d 762 (1957); *Goodnoe Hills Sch. Dist. No. 24 v. Forry,* 52 Wash.2d 868, 329 P.2d 1083 (1958); *Water Dist. No. 105 v. State,* 79 Wash.2d 337, 485 P.2d 66 (1971); & *Belancsik v. Overlake Mem'l Hosp.,* 80 Wash.2d 111, 492 P.2d 219 (1971).

of the original title, is harmful and incorrect. Any original act passed by the legislature is subject to traditional article II, section 19 challenges, ensuring compliance with our constitution and adherence to the goals stated above. When amending an original act, it is unnecessary to examine the amendatory title for strict compliance with article II, section 19 because the underlying act has already passed such scrutiny. In these cases, we need only inquire if the amendatory act explicitly identifies what sections of the original act it is purporting to amend and that the amendments proposed could have been included in the original act. If the answer to both questions is yes, the amendatory title passes constitutional scrutiny. We take this opportunity to explicitly reaffirm the *St. Paul* cases and hold that, for the purposes of article II, section 19 challenges, the title of an amendatory act is sufficient if the title identifies and purports to amend the original act and the subject matter of the amendatory act is within the purview of the title of the original act.

¶ 10 The dissent agrees with the appellant and would likewise overrule *St. Paul*. The dissent similarly fails to show how the *St. Paul* rule is incorrect or harmful and provides little reasoning to support its conclusion that the rule undercuts the constitutional provision at issue. In fact, *St. Paul* does not undercut our constitution, but rather reflects the general understanding of article II, section 19 at the time it was adopted. *St. Paul* relied primarily on a treatise which explained:

> "If the title identifies and purports to amend a prior act, any matter properly connected with, or germane to, the subject expressed in the title of that act may be included in the body of the amendatory act. Any matter that could validly

> have been enacted as part of the original act under its title is considered germane. If the title of the original act is sufficient to embrace the matter contained in the amendatory act, the sufficiency of the title of the latter will not be inquired into."

St. Paul, 40 Wash.2d at 355, 243 P.2d 474 (quoting 1 J.G. Sutherland, *Statutes and Statutory Construction* § 1908 (Frank E. Horack, Jr., ed., 3d ed.1943)). The treatise, in turn, reflected the common understanding of how to interpret similar state constitutional provisions. *See, e.g., Morford v. Unger,* 8 Iowa 82 (1859) (interpreting article III, section 26 of the Iowa Constitution reading, "[e]very law shall embrace but one object which shall be expressed in its title"); *In re Miller,* 29 Ariz. 582, 244 P. 376, 379 (1926) (interpreting article IV, section 13 of the Arizona Constitution reading, "[e]very act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title"). Thus, *St. Paul* and its progeny reflect the common understanding of article II, section 19 at the time it was adopted. This rule is well established. Because the appellant and the dissent cannot show how this rule is incorrect or harmful, we will not overrule it.[3]

¶ 11 The title of SHB 3055 reads, "AN ACT Relating to admissibility of DUI tests; amending RCW 46.61.506; reenacting and amending RCW 46.20.308 and 46.20.3101;

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[3] Further, as the dissent recognizes, the rule applied in *St. Paul* has been applied in subsequent cases. What the dissent fails to acknowledge is that the *St. Paul* analysis in turn cited to a 1908 treatise for support and was not a new or novel approach. *St. Paul* and other cases are entirely consistent with the general understanding of how article II, section 19 would operate when it was adopted.

and creating a new section." Here, the title of SHB 3055 states explicitly that it is amending RCW 46.61.506 and reenacting and amending RCW 46.20.308 and 46.20.3101. The act meets the first prong of the above test by explicitly identifying and announcing its amendment of the original act.

¶ 12 Next, we must determine if the subject matter of SHB 3055 falls within the scope of the original act. The title of the original act reads, "AN ACT Relating to vehicles; providing for the regulation and licensing thereof and of persons in relation thereto; providing for the collection and disposition of moneys; enacting a vehicle code to be known as Title 46 of the Revised Code of Washington-"Motor Vehicles"; providing penalties; repealing certain acts and parts of acts; and declaring an emergency." LAWS OF 1961, CH. 12. The scope of the original act includes the creation of Title 46 of the Revised Code of Washington and deals specifically with motor vehicles, the regulation and licensing of vehicles and persons, and provides penalties for violations of the act. The subject matter of SHB 3055, which concerns preliminary procedures of BAC tests, including search warrants and required warnings along with the admissibility of BAC tests in court, logically fits within the ambit of the regulation of vehicles and penalties for violations of those regulations. We conclude that the title of SHB 3055 adequately announces it is amending the Motor Vehicle Act, and the subject matter of SHB 3055 is within the purview of the Motor Vehicle Act. SHB 3055 does not offend article II, section 19 of our constitution.

II. SEPARATION OF POWERS

¶ 13 The doctrine of separation of powers, implicit in our state constitution, divides the political power of the people into three co-equal branches of government. Though the doctrine is designed to prevent one branch from usurping the power given to a different branch, the three branches are not hermetically sealed and some overlap must exist. "'The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.'" *State v. Moreno,* 147 Wash.2d 500, 505-06, 58 P.3d 265 (2002) (quoting *Carrick v. Locke,* 125 Wash.2d 129, 135, 882 P.2d 173 (1994)). The issue here is whether the legislature is threatening the independence or integrity or invading the prerogative of the judiciary by passing SHB 3055.

¶ 14 This court is vested with judicial power from article IV of our state constitution and from the legislature under RCW 2.04.190.[4] The inherent power of article IV includes the power to govern court procedures. The delegated power of RCW 2.04.190 includes the power to adopt rules of procedure. *State v. Fields,* 85 Wash.2d 126, 128-29, 530 P.2d 284 (1975). In general, the judiciary's province is procedural and the legislature's is substantive. "Substantive law prescribes norms for societal conduct and punishments

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[4] RCW 2.04.190 reads in part, "[t]he supreme court shall have the power to prescribe . . . the forms of writs and all other process, . . . of taking and obtaining evidence; . . . and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature . . . ."

for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *State v. Smith,* 84 Wash.2d 498, 501, 527 P.2d 674 (1974). The adoption of the rules of evidence is a legislatively delegated power of the judiciary. RCW 2.04.190. Therefore, rules of evidence may be promulgated by both the legislative and judicial branches. When a court rule and a statute conflict, the court will attempt to harmonize them, giving effect to both. Whenever there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court's inherent power, the court rule will prevail. *Wash. State Council of County & City Employees v. Hahn,* 151 Wash.2d 163, 168-69, 86 P.3d 774 (2004).

¶ 15 The appellant argues that SHB 3055 is not a substantive bill but instead is an attempt to regulate court procedure by mandating the admission of BAC test results. The appellant relies on the language of section 4(4)(c), which reads:

> Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. *Such challenges, however, shall not preclude the admissibility of the test* once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

SHB 3055, § 4(4)(c) (emphasis added). Thus, according to the appellant, once the State has met its prima facie burden under section 4(4)(a), the results of the BAC test *must* be admitted. The appellant argues that under this interpretation, the act conflicts directly with the court's authority to exclude evidence based on relevancy or prejudice under ER 401, 402, 403, and 404(b).

¶ 16 The respondent argues that SHB 3055 is merely a codification of admissibility rules for BAC tests as they have developed from our case law. This court first outlined the prima facie requirements for the admission of Breathalyzer test results in *State v. Baker,* 56 Wash.2d 846, 355 P.2d 806 (1960). The prima facie requirements under *Baker* are that (1) the machine was properly checked and in proper working order at the time of conducting the test (2) the chemicals employed were of the correct kind and compounded in the proper proportions (3) the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within 15 minutes prior to taking the test and (4) the test be given by a qualified operator and in the proper manner. All remaining challenges went to the weight of the test results, not its admissibility. *Baker,* 56 Wash.2d at 852-55, 355 P.2d 806. In 1969, by initiative, the role of approving testing instruments, establishing procedures for conducting tests, and licensing individuals to conduct the test was delegated to a state toxicologist. The toxicologist eventually recommended that the machine be switched from the Breathalyzer to the BAC Verifier DataMaster machine and adopted appropriate regulations, including a modified version of the four *Baker* requirements. The respondent argues that this court continued to look only to the modified *Baker* requirements codified in the Washington

Administrative Code by the toxicologist and regarded all other challenges as going to weight and not admissibility.

¶ 17 However, in 2004, this court deviated from precedent and suppressed numerous BAC tests based on a failure to comply with a WAC that did not concern one of the four *Baker* requirements. *City of Seattle v. Clark-Munoz,* 152 Wash.2d 39, 93 P.3d 141 (2004) (holding that the State failed to comply with former WAC 448-13-035 (2001) by using thermometers not traceable to standards maintained by the National Institute of Standards and Testing). The respondent maintains that in response to *Clark-Munoz,* the legislature restored its authority to prescribe admissibility requirements, which had previously been delegated to the state toxicologist, by enacting SHB 3055. The legislature is now reaffirming the modified *Baker* requirements and expanding them to include three additional requirements, as prima facie evidence of admissibility and requiring all other challenges to the reliability or accuracy of the tests to go to the weight of the evidence.[5]

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[5] SHB 3055, section 4(4)(a) reads:

> A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or an administrative proceeding if the prosecution or department produces prima facie evidence of the following:
>
> (i) The person who performed the test was authorized to perform such test by the state toxicologist;
>
> (ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;
>
> (iii) The person being tested did not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;

(Continued on following page)

Essentially, the legislature is attempting to return the requirements of BAC test admissibility to the way it was before our holding in *Clark-Munoz*.

¶ 18 The respondent further argues that the standard adopted in SHB 3055 is the legislature's attempt to put BAC test results on the same level as other scientific tests, such as DNA (deoxyribonucleic acid) test results. That is, the legislature is essentially adopting the *Frye*[6] rule for BAC test admissibility. Under the *Frye* standard, scientific evidence is admissible when it is generally accepted as reliable within the relevant scientific community. The courts need not assess the reliability of the scientific evidence, they should defer to the judgment of scientists. *State v. Copeland,* 130 Wash.2d 244, 254, 922 P.2d 1304 (1996). Once the *Frye* standard is satisfied, however, the trial court resumes its role as gatekeeper and may exclude otherwise admissible evidence by applying the rules of evidence.

(iv) Prior to the start of the test, the temperature of the simulator solution as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade;

(v) The internal standard test resulted in the message "verified";

(vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist;

(vii) The simulator external standard result did lie between .072 to .088 inclusive; and

(viii) All blank tests gave results of .000.

[6] *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923). This standard was adopted implicitly in Washington in *State v. Woo,* 84 Wash.2d 472, 527 P.2d 271 (1974), and explicitly in *State v. Canaday,* 90 Wash.2d 808, 585 P.2d 1185 (1978).

¶ 19 In the DNA analogy, DNA admissibility has been accepted under *Frye;* however, challenges to the weight of the DNA evidence, including laboratory error, the size, quality, and randomness of Federal Bureau of Investigation (FBI) databases, and the methodology and practices of the FBI in declaring a DNA match, are subject to ER 702 admissibility as determined by the trial court. *State v. Cannon,* 130 Wash.2d 313, 325, 922 P.2d 1293 (1996). Similarly, the respondent argues, SHB 3055 sets forth the standards for reliability; once reliability of the test is established by a prima facie showing from the State, all other challenges concerning the accuracy or reliability of the test, the testing instrument, or the maintenance procedures necessarily go to the weight of the test results. That is, the trial court may still utilize the rules of evidence, including ER 702, to determine if the BAC test results will be admitted.

¶ 20 The twin cases of *State v. Zwicker,* 105 Wash.2d 228, 713 P.2d 1101 (1986), and *State v. Long,* 113 Wash.2d 266, 778 P.2d 1027 (1989), are helpful to our analysis. Both cases involve the implied consent statute, RCW 46.20.308, and its evidentiary counterpart, RCW 46.61.517. The implied consent statute, passed in 1969, states that any person who operates a motor vehicle within the state has consented to have his or her blood or breath tested for purposes of detecting the presence of alcohol or other drugs. Consent can be revoked by refusal to submit to the tests. In the first version of RCW 46.61.517, refusal to submit to a test was admissible without comment and required a jury instruction that no inference could be drawn from the defendant's refusal. In *Zwicker,* this court held that because no inference could be drawn from the refusal, the evidence was not part of the State's case in

chief and therefore could be admitted only if the defendant first opened the matter by arguing lack of credibility or competence on the part of the police. In 1985 and 1986, the legislature amended the statute to read only that refusal to submit to a BAC test was admissible and deleted the language concerning the jury instruction or the requirement that the evidence be admitted without comment. In *Long,* this court interpreted these amendments as a legislative determination that refusal evidence is admissible to infer guilt or innocence, commenting "[w]e see no satisfactory reason not to follow the Legislature's now clear intent of rendering refusal evidence fully admissible in a criminal trial for driving while under the influence of intoxicants." *Long,* 113 Wash.2d at 272-73, 778 P.2d 1027. In recognizing this legislative rule of evidence, this court made clear that depending on the facts of a particular case, a trial court could still exclude such evidence if its probative value were substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury under ER 403.

¶ 21 The same analysis applies here. The legislature has made clear its intention to make BAC test results fully admissible once the State has met its prima facie burden. No reason exists to not follow this intent. The act does not state such tests must be admitted if a prima facie burden is met; it states that such tests are *admissible.* The statute is permissive, not mandatory, and can be harmonized with the rules of evidence. There is nothing in the bill, either implicit or explicit, indicating a trial court could not use its discretion to exclude the test results under the rules of evidence. The legislature is not invading the prerogative of the courts nor is it threatening judicial independence.

SHB 3055 does not violate the separation of powers doctrine.

III. DUE PROCESS

¶ 22 The appellant argues that under the federal and state constitutions, he is entitled to a fair trial, including a right to be convicted by reliable evidence. He argues that SHB 3055 violates his rights because it admits unreliable evidence and inappropriately places the burden of proof of the reliability of the evidence on the defendant. The appellant's argument is without merit.

¶ 23 The foundational requirements to establish the admissibility of breath tests were first established in *Baker.* Since *Baker,* the State has always had the initial burden to satisfy the foundational requirements. Once the results are admitted, the defendant may introduce evidence attacking their accuracy or reliability. *City of Seattle v. Allison,* 148 Wash.2d 75, 79-80, 59 P.3d 85 (2002). Similarly, SHB 3055 sets forth the requirements the State must establish, including the four modified *Baker* requirements, before the BAC test results may be admitted. Once the State makes a prima facie showing of admissibility and the court admits the evidence, the defendant may introduce evidence attacking the reliability or accuracy of the test. SHB 3055 does not alter the burden of the State in DUI cases, it is merely codifying it. The appellant has not shown an impermissible or unconstitutional shifting of the evidentiary burden.

CONCLUSION

¶ 24 The Motor Vehicle Act does not violate article II, section 19, the separation of powers doctrine, nor does it

offend due process as embodied in both the state and federal constitutions. The trial court is affirmed.

Concurring: ALEXANDER, C.J., MADSEN and BRIDGE.OWENS, J. (concurring).

¶ 25 I concur in the majority's rejection of the appellant's constitutional claims. However, while I agree with the majority that Substitute House Bill 3055 (SHB 3055), Laws of 2004, ch. 68, does not violate article II, section 19 of the Washington Constitution, I share the dissent's disagreement with the method that the majority has adopted to assess the bill's compliance with the constitutional provision.

¶ 26 Article II, section 19 comprises "two distinct prohibitions." *Amalgamated Transit Union Local 587 v. State,* 142 Wash.2d 183, 207, 11 P.3d 762, 27 P.3d 608 (2000). The first clause, the single-subject rule, provides that "[n]o bill shall embrace more than one subject," while the second clause, the subject-in-title (or clear-title) rule, stipulates that "*that* [*subject*] shall be expressed in the title." WASH. CONST. art. II, § 19 (emphasis added). As we have frequently acknowledged, "[t]he purpose of [the single-subject clause] is *to prevent logrolling* or pushing legislation through by attaching it to other legislation,"[1]

[1] "[T]he single subject rule exists 'to secure to every distinct measure of legislation a separate consideration and decision, dependent solely upon its individual merits.'" Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges,* 38 HARV. J. ON LEGIS. 103, 114 (2001) (quoting Millard H. Ruud, *No Law Shall Embrace More Than One Subject,* 42 MINN. L. REV. 389, 390 (1958)). One type of logrolling involves "the enactment of an unpopular provision pertaining to one subject by attaching it to a more popular provision whose subject is unrelated," *City of Burien v. Kiga,* 144

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while the aim of the subject-in-title rule is "*to notify members of the Legislature and the public* of the subject matter of the measure." *Amalgamated,* 142 Wash.2d at 207, 11 P.3d 762 (emphasis added).

¶ 27 The majority purports to analyze both the single-subject and subject-in-title requirements by applying the rule set forth in *St. Paul & Tacoma Lumber Co. v. State,* 40 Wash.2d 347, 243 P.2d 474 (1952). Majority at 779-81. I would explicitly overrule the *St. Paul* rule as "incorrect and harmful."[2] Not only is the rule contrary to the plain language of article II, section 19, its initial application in *St. Paul* in 1952 was a departure from this court's prior article II, section 19 decisions expressly rejecting the kind of title the *St. Paul* rule permits-a title that provides insufficient notice of an act's subject. Additionally, that the *St. Paul* rule was not well founded or well explained is evident in its meager offspring-four cases filed between 1957 and 1971 that do not apply the rule consistently (the majority opinion, which merely cites the four, makes it five); moreover, in a 1960 decision, the majority neglected

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Wash.2d 819, 825, 31 P.3d 659 (2001), but logrolling could likewise enable the passage of a bill comprised of a number of provisions that individually would not have garnered majority support. *See* Dragich, *supra,* at 115.

[2] The doctrine of stare decisis permits a court to "change *a rule of law*" upon "a clear showing that *an established rule* is incorrect and harmful before it is abandoned." *In re Rights to Waters of Stranger Creek,* 77 Wash.2d 649, 653, 466 P.2d 508 (1970) (emphasis added). Although the *St. Paul* rule was never, in my view, "an established rule" that stare decisis should protect, the *St. Paul* rule in any case satisfies the stare decisis "incorrect and harmful" standard. *See* Reply Br. of Appellant at 10 n. 11 (asserting that the *St. Paul* rule is not "an established rule, but a rule of questionable origin, applied in only five cases, and not followed since 1971").

the rule entirely. Finally, in cases spanning the last 25 years, this court has silently, but clearly overruled the *St. Paul* rule by reaffirming this court's earliest decisions interpreting article II, section 19. In sum, I would adhere to the plain language of article II, section 19 and analyze SHB 3055's compliance with the provision by asking whether SHB 3055 "embrace[s]" a single subject and whether that subject is "expressed in the title." Contrary to the dissent, I would conclude that SHB 3055 satisfies the single-subject and subject-in-title requirements.

¶ 28 *The St. Paul Rule.* The *St. Paul* court was asked to determine the constitutionality of a 1949 bill imposing an excise tax on a lumber company's use of articles derived from timber the company had cut in this state. The lumber company contended that the 1949 amendments to the original revenue act of 1935 violated article II, section 19 because "the title of the amendatory act" did not notify legislators or the public "that the 1949 amendments changed the scope and object of the law as enacted in 1935." 40 Wash.2d at 355, 243 P.2d 474. Responding to the lumber company's clear-title challenge, the *St. Paul* court turned to the following rule:

> "If the title identifies and purports to amend a prior act, any matter properly connected with, or germane to, the subject expressed in the title of that act may be included in the body of the amendatory act. Any matter that could validly have been enacted as part of the original act under its title is considered germane. If the title of the original act is sufficient to embrace the matter contained in the amendatory act, the sufficiency of the title of the latter will not be inquired into."

Id. (quoting 1 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 1908, at 345-46 (Frank E. Horack, Jr., ed., 3d ed.1943) (footnotes omitted)). In other words, as long as the title of an amendatory bill identifies the prior act that it is amending, the new bill may permissibly include "'[a]ny matter that could validly have been enacted as part of the original act under its title.'" *Id.* The *St. Paul* court thus began its application of the rule by quoting the title of the original revenue act of 1935 – "'AN ACT relating to revenue and taxation; . . . providing for the levy and collection of a tax upon the use of personal property'" – and went on to observe that "[t]he title of the 1949 amendatory act states that it is an act relating to revenue and taxation and denominates specifically the sections of the 1935 act, as amended, which it further amends." *Id.* (citation omitted). Concluding that "[t]he title of the 1935 act was certainly broad enough to have permitted, as part of the original act, the 1949 amendments with which we are concerned," the *St. Paul* court rejected the lumber company's clear-title challenge with no further discussion. *Id.*

¶ 29 The *St. Paul* court applied the rule to the lumber company's clear-title challenge without acknowledging that the rule is inconsistent with the plain language of article II, section 19 and contrary to this court's earliest decisions interpreting the clear-title provision. As the dissent correctly points out, given that article II, section 19 reads, "[*n*]*o bill* shall embrace more than one subject" (emphasis added), "[c]learly, the plain text of our constitution does not differentiate between 'original' and 'amendatory' bills." Dissent at 790-91 n. 1. By its plain language, article II, section 19 requires that *any* bill, whether original or

amendatory, must embrace a single subject that is expressed in *that bill's* title.

¶ 30 By adopting a rule that permits the title of an amendatory bill to say nothing more than "An Act amending a Prior Act," the *St. Paul* court ignored this court's earliest article II, section 19 decisions rejecting precisely the type of title that the *St. Paul* rule permits. In a brief filed in *Fray v. Spokane County,* 134 Wash.2d 637, 952 P.2d 601 (1998), amicus curiae Washington State Council of Police Officers explained that "[t]he delegates to the Constitutional Convention did not write on a blank slate" when they drafted article II, section 19, since "[t]he Organic Act which organized the Territory of Washington had similarly required that . . . 'every law shall embrace but one object, and that shall be expressed in the title.'" Br. of Amicus Curiae Wash. State Council of Police Officers at 7 (*Fray v. Spokane County,* No. 65236-8 (Wash.Sup.Ct.1998)) (quoting U.S. Stats. 32nd Cong., Sess. II, ch. 90, § 6 (1853)). The amicus recalled that in *Harland v. Territory,* 3 Wash. Terr. 131, 13 P. 453 (1887), "[t]he leading case interpreting this clause of the Organic Act," *id.,* the court considered the permissibility under the Organic Act of a statute entitled, "'[a]n act to amend section 3050, chapter 238, of the Code of Washington Territory.'" 3 Wash. Terr. at 137, 13 P. 453. The *Harland* court concluded that "the clear weight of authority, and certainly sound reason, [was] against the position that a reference to a section in the title of an amendatory act without more is in any case sufficient" to satisfy the clear-title provision in the Organic Act. *Id.* at 151, 13 P. 453.

¶ 31 Fifteen years later, in *State ex rel. Seattle Electric Co. v. Superior Court,* 28 Wash. 317, 68 P. 957 (1902), the court reaffirmed *Harland,* holding that the title "'[a]n act

to amend section 5645 of Ballinger's Annotated Codes and Statutes of Washington'" failed to satisfy article II, section 19. *Id.* at 321, 68 P. 957. The court fully explained its holding:

> [T]he mandate of the constitution seems to us so plain that we conceive it to be our duty to hold squarely *that a mere reference to a section in the title of an act does not state a subject.* What is the significance of the word "subject," in this connection? Webster defines it as "that of which anything is affirmed or predicated; the theme of a proposition or discourse; that which is spoken of." To say that mere reference to a numbered section embodies the idea of a theme, proposition, or discourse, it seems to us, is not sustained by the ordinary understanding of those terms. The theme of a legislative act is that of which it treats, and an amending act treats of the theme covered by the act sought to be amended. We therefore see no escape from the conclusion that *the title of an amending act must contain some words which indicate the theme or proposition of which the act sought to be amended treats.*

Id. at 325-26, 68 P. 957 (emphasis added). The decisions in *Harland* and *Seattle Electric*-cases decided closely before and after the Constitutional Convention-undeniably refute the claim made by the majority in the present case that the *St. Paul* rule "does not undercut our constitution, but rather reflects the general understanding of article II, section 19 at the time it was adopted."[3] To the contrary, the

[3] Majority at 780. To support its assertion that the rule adopted in *St. Paul* "reflected the common understanding of how to interpret similar state constitutional provisions," the majority cited two cases

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rule that the *St. Paul* court adopted in 1952-a rule that reduced the descriptive title of an amendatory act to surplusage in an article II, section 19 inquiry-was a sharp departure from this court's understanding of the subject-in-title provision in 1887 and 1902.

¶ 32 In sum, the *St. Paul* court adopted a rule that was "incorrect and harmful." *In re Rights to Waters of Stranger Creek,* 77 Wash.2d 649, 653, 466 P.2d 508 (1970). The *St. Paul* court negated, with neither discussion nor acknowledgment, this court's prior decisions, turning instead to a treatise that stated a principle unsupported by any citations to Washington cases. *See* 1 SUTHERLAND, *supra,* § 1908. Moreover, the *St. Paul* court made notice irrelevant and thereby contravened the aim of the subject-in-title requirement-the notification of legislators and the public as to the subject of a piece of legislation. The treatise on which the *St. Paul* court relied specifically stated that, under the rule at issue, "[n]o statement of the matter with which the amendatory act deals nor any expression of the particulars in which the original act or section is altered is necessary." *Id.; see also Water Dist. No. 105 v. State,* 79 Wash.2d 337, 340, 485 P.2d 66 (1971) (expressly stating that, under the *St. Paul* rule, "the issue is not . . . whether the title of the [amendatory] act gives notice of the subject matter contained therein").

¶ 33 *The St. Paul Cases.* In the 20 years after *St. Paul* was decided, the *St. Paul* rule, which was directed at the subject-in-title requirement of article II, section 19, was applied in four cases and ignored by the majority in

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from other jurisdictions. Majority at 780 (citing *Morford v. Unger,* 8 Iowa 82 (1859); *In re Miller,* 29 Ariz. 582, 244 P. 376 (1926)).

another. In two of the four cases, the article II, section 19 inquiry was restricted to the subject-in-title requirement, although it is not entirely clear that the challenge had been likewise restricted. In *Goodnoe Hills School District No. 24 v. Forry,* 52 Wash.2d 868, 329 P.2d 1083 (1958), the court noted the appellants' contention that an amendatory act violated article II, section 19 and their "argu[ment] that included within [the amendatory act's] title are two subjects." *Id.* at 873, 329 P.2d 1083. The *Goodnoe* court applied the *St. Paul* rule and concluded that the title of a 1955 amendatory act was not "constitutionally repugnant," since it came within the general title of the original 1953 legislation. *Id.* at 873-74, 329 P.2d 1083. Similarly, in *Belancsik v. Overlake Memorial Hospital,* 80 Wash.2d 111, 492 P.2d 219 (1971), the issue is initially defined as whether an amendatory statute violated article II, section 19, but the court applied the *St. Paul* rule and focused its inquiry on the constitutional adequacy of the title.

¶ 34 In the other two *St. Paul* cases, the court applied the *St. Paul* rule to the subject-in-title inquiry and then considered the single-subject requirement, but the courts differed in how they analyzed the subject of the amendatory act. In *Keeting v. Public Utility District No. 1 of Clallam County,* 49 Wash.2d 761, 306 P.2d 762 (1957), the single-subject inquiry was framed as whether "the [original and amendatory] acts embrace more than one subject." *Id.* at 764, 306 P.2d 762. The court appeared to conclude that the amendatory act's changes in the original law constituted a single subject because they "related to the single subject" expressed in the original act's title. *Id.* However, while the single-subject analysis in *Keeting* was evidently affected by the *St. Paul* rule, this court took the customary approach to single-subject analysis in *Water*

District, 79 Wash.2d 337, 485 P.2d 66. The *Water District* court concluded that "[t]he subjects contained in the body of the [amendatory] act . . . are naturally and reasonably connected with the general subject, relating to water districts, expressed in the [amendatory act's] title." *Id.* at 342, 485 P.2d 66.

¶ 35 That the *St. Paul* court did not adequately explain how the rule was to be applied is not only apparent in the four *St. Paul* cases, it is evident in the way the majority in the present case has applied the rule. Even though the appellant has challenged the constitutionality of SHB 3055 on both single-subject and subject-in-title grounds, the majority rests after applying the *St. Paul* rule, a rule that by its terms was intended only to test the constitutionality of an amendatory act's title. The majority must provide a single-subject analysis and resolve the question raised by the differing approaches in *Keeting* and *Water District* – that is, what effect, if any, does the *St. Paul* rule have on the single-subject analysis. An additional shortcoming in the majority's decision to "reaffirm the *St. Paul* cases," majority at 780, is the majority's failure to acknowledge that, in the time period spanned by the *St. Paul* cases, this court decided *Price v. Evergreen Cemetery Co.,* 57 Wash.2d 352, 357 P.2d 702 (1960). There, a majority of the court failed to apply the *St. Paul* rule. *See id.* at 358-59, 357 P.2d 702 (Finley, J., dissenting). In sum, had the majority in the present case done more than merely cite the four *St. Paul* cases, *see* majority at 779 n. 2, it would have discovered that the *St. Paul* rule was not applied clearly in the *St. Paul* cases or adopted consistently in the time period spanned by those cases.

¶ 36 *Cases Silently Overruling the St. Paul Rule.* As the appellant has pointed out, while the *St. Paul* rule has

been applied in only five cases (most recently in 1971), dozens of cases could be cited in which the court weighed the constitutionality of an amendatory act without recourse to the title of the original act. *See* Reply Br. of Appellant at 10 n. 11 (collecting cases). For example, in *Patrice v. Murphy,* 136 Wash.2d 845, 966 P.2d 1271 (1998), this court was asked to determine whether the title of an amendatory act, "'AN ACT Relating to court costs,'" was sufficient to express the subject of an act that required arresting officers to provide interpreters for hearing-impaired persons. *Id.* at 853, 966 P.2d 1271. The *Patrice* court made its determination that the title was constitutionally insufficient by looking exclusively at the title of the amendatory act, silently ignoring the *St. Paul* rule. Indeed, the weight of our case law has adhered to two principles contrary to the *St. Paul* rule: that, for purposes of a subject-in-title challenge to an amendatory act, the relevant title is the title of the amendatory act and the amendatory act's title must do more than point to the act being amended. *See Seattle Elec.,* 28 Wash. at 325-26, 68 P. 957; *Fray,* 134 Wash.2d at 654-55, 952 P.2d 601 (reaffirming that the "'mere reference to a section in the title of an act does not state a subject'" (quoting *Seattle Elec.,* 28 Wash. at 325, 68 P. 957)); *State v. Thomas,* 103 Wash.App. 800, 808, 14 P.3d 854 (2000) (defining the relevant title as "the word, phrase, or phrases following 'AN ACT Relating to . . . ' and preceding the first semicolon").

¶ 37 *SHB 3055's Compliance with Article II, Section 19.* This court has adopted a framework that makes the single-subject analysis contingent on the preliminary labeling of the bill's title as either "general" or "restrictive."[4] A general title

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[4] *See Amalgamated,* 142 Wash.2d at 207-11, 11 P.3d 762. *But see Pierce County v. State,* 150 Wash.2d 422, 431 n. 3, 78 P.3d 640 (2003)

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"is broad rather than narrow." *Amalgamated,* 142 Wash.2d at 207, 11 P.3d 762. Where a title is general, the act will have a single subject if the parts of the bill are germane to the title and rationally related to each other. *Citizens for Responsible Wildlife Mgmt. v. State,* 149 Wash.2d 622, 632-33, 71 P.3d 644 (2003); *Amalgamated,* 142 Wash.2d at 209, 11 P.3d 762; *Pierce County v. State,* 150 Wash.2d 422, 431 n. 3, 78 P.3d 640 (2003).

¶ 38 I would define the title of SHB 3055, "AN ACT Relating to admissibility of DUI [driving under the influence of an intoxicant] tests," as general. Although "DUI" does refer to a specific statute, the average citizen would interpret the acronym more broadly as a reference to alcohol-related driving offenses. I would conclude that, because the component parts of SHB 3055 are rationally related to the general title and to each other, the act embraces a single subject. The incidental subjects of SHB 3055 are search warrants under the implied consent statute, requirements governing an officer's request for a blood draw, warnings to be given to a suspect under the implied consent statute prior to administering a blood or

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(noting party's question as to " 'whether going through the exercise of labeling a title as "broad" or "restrictive" really assists the constitutional analysis' "). At least one commentator has emphasized that the single-subject analysis should precede the analysis of the title and should be directed to the bill's contents: "It is well-established that even when combined, the single subject/clear title provision sets forth two independent requirements-that a bill have only one subject, and that the bill's title clearly express that subject. The common phrasing of the rule suggests that *clear title analysis cannot proceed until the subject of the bill has been determined and found to be 'single.'* . . . [T]he subject of a bill should be measured by the content of its provisions. The provisions must relate to each other and together must constitute a single subject. The title must express the subject, *but the title is not its test.*" Dragich, *supra* note 1, at 114, 146 (emphasis added) (footnote omitted).

breath alcohol concentration (BAC) test, and the foundational requirements for admission of BAC test results. The incidental subjects are directed toward providing uniform standards for the admissibility of BAC tests and relate to how or when the test must be conducted to ensure its validity and admissibility.

¶ 39 I would likewise conclude that the subject of SHB 3055 was sufficiently expressed in the bill's title to pass article II, section 19 muster. To satisfy the constitutional requirement, a bill's "title need not be an index to the contents, nor must it provide details of the measure." *Citizens,* 149 Wash.2d at 639, 71 P.3d 644. The title of SHB 3055 is a general expression of the bill's contents and is sufficient to notify legislators and the public that the bill contains provisions rationally related to the admissibility of tests administered pursuant to alcohol-related driving offenses.

¶ 40 In sum, I concur in the majority's conclusion that SHB 3055 does not violate article II, section 19, but I join the dissent in rejecting the majority's reliance on the *St. Paul* rule to assess the bill's compliance with the constitutional provision. The *St. Paul* court mistakenly imported into its article II, section 19 analysis a rule applicable to a type of bill title that this court had already rejected decades earlier as constitutionally repugnant. The majority's resurrection of the *St. Paul* rule effectively provides a safe constitutional harbor for amendatory acts that give absolutely no notice of their contents beyond a spare reference to the act being amended. Because the *St. Paul* rule subverts the purpose of the subject-in-title requirement of article II, section 19, this court should explicitly disapprove the rule.

Concurrence: FAIRHURST and CHAMBERS, JJ.

SANDERS, J. (dissenting).

¶ 41 In 2004 the legislature enacted Substitute House Bill 3055 (SHB 3055), entitled, "AN ACT Relating to admissibility of DUI [driving under the influence of an intoxicant] tests." Substitute H.B. 3055, 58th Leg., Reg. Sess. (Wash.2004); Laws of 2004, ch. 68. This statute violates article II, section 19 of the Washington State Constitution by (1) embracing multiple subjects and (2) including subjects not expressed in its title. It also violates separation of powers by impermissibly invading the article IV judicial power reserved exclusively to the courts to determine the admissibility of evidence. I would hold SHB 3055 unconstitutional in its entirety and therefore dissent.

I. Article II, Section 19

¶ 42 The majority undermines the protections of article II, section 19 by misapplying *St. Paul & Tacoma Lumber Co. v. State,* 40 Wash.2d 347, 355, 243 P.2d 474 (1952) to hold the subject of SHB 3055 is expressed in its title. The majority then compounds its error by conflating the two distinct inquiries under article II, section 19, concluding the subject-in-title analysis disposes of the multiple subject claim as well.

¶ 43 Article II, section 19 of the Washington Constitution provides, "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." WASH. CONST. art. II, § 19. This clause mandates two distinct prohibitions: "'(1) No bill shall embrace more than one subject; and (2) the subject of every bill shall be expressed in the title.'" *Patrice v. Murphy,* 136 Wash.2d 845, 852, 966

P.2d 1271 (1998) (quoting *State ex rel. Wash. Toll Bridge Auth. v. Yelle,* 32 Wash.2d 13, 23, 200 P.2d 467 (1948)). The first prohibition, the single-subject rule, ensures legislators are not forced to vote for provisions they do not support in order to secure the enactment of those they do, a practice known as "logrolling" legislation. The second prohibition, the subject-in-title rule, ensures legislators and the public are notified of the subject matter of a bill. "We have declared that when laws are enacted in violation of [these rules], the courts will not hesitate to declare them void." *State ex rel. Wash. Toll Bridge Auth.,* 32 Wash.2d at 24, 200 P.2d 467.

¶ 44 Constitutional challenges raise questions of law subject to de novo review. *City of Redmond v. Moore,* 151 Wash.2d 664, 668, 91 P.3d 875 (2004).

II. Article II, Section 19'S Single-Subject Rule

¶ 45 Whether a measure contains more than one subject "is founded on the question whether a measure is drafted in such a way that those voting on it may be required to vote for something of which the voter disapproves in order to obtain approval of an unrelated law." *Amalgamated Transit Union Local 587 v. State,* 142 Wash.2d 183, 212, 11 P.3d 762, 27 P.3d 608 (2000). For a bill to pass constitutional muster under the single-subject rule "'there must be some rational unity between the matters embraced in the act, the unity being found in the general purpose of the act and the practical problems of efficient administration.'" *State ex rel. Wash. Toll Bridge Auth. v. Yelle,* 61 Wash.2d 28, 33, 377 P.2d 466 (1962) (quoting *State ex rel. Test v. Steinwedel,* 203 Ind. 457, 467, 180 N.E. 865, 868 (1932)). Rational unity is lacking if a

bill's provisions are not necessary to implement one another. *Amalgamated,* 142 Wash.2d at 217, 11 P.3d 762. A bill embracing more than one subject must be struck down in its entirety because "we cannot know if either subject . . . would have garnered popular support standing alone." *City of Burien v. Kiga,* 144 Wash.2d 819, 828, 31 P.3d 659 (2001).

¶ 46 SHB 3055 lacks rational unity between its provisions. In addition to addressing the admissibility of DUI tests, SHB 3055, sections 2 and 3 also authorize search warrants for a person's breath or blood, reduce the requirements of implied consent warnings to require only substantial compliance by the police, address license sanctions stemming from arrests, and implement procedural changes regarding the arrest of persons under 21 years of age for driving impaired. None of these subjects is necessary to implement the DUI test admissibility provisions of section 4 of SHB 3055. Consequently, SHB 3055 violates the single-subject prong of article II, section 19 of the Washington Constitution. *Amalgamated,* 142 Wash.2d at 217, 11 P.3d 762.

¶ 47 This conclusion is further reinforced by actual evidence of logrolling. Section 2 of SHB 3055 *denies* occupational licenses to drivers who refuse breath tests. However later in the same session the legislature unanimously passed SHB 2660 to *allow* occupational licenses for such drivers. LAWS OF 2004, CH. 95 (Substitute H.B. 2660, 58th Leg., Reg. Sess. (Wash.2004)). The passage of these bills cannot be logically reconciled other than to conclude those voting for SHB 3055 voted for at least one provision they did not support to ensure the passage of those they did. This is evidence of a textbook example of logrolling in violation of our constitution.

¶ 48 Inexplicably, the majority's analysis of whether SHB 3055 addresses more than one subject is limited to its title, a constitutionally separate inquiry, and lacks any meaningful scrutiny of the bill's substance. *See* majority at 779-81. As a preliminary matter it must be noted the Washington Constitution does not provide, and we have never held, a bill which impermissibly embraces more than one subject is nonetheless constitutional because its title, or the title of a bill it purports to amend, somehow rectifies the violation. Furthermore, the case relied on by the majority for its holding, *St. Paul,* 40 Wash.2d 347, 243 P.2d 474[1] does not support its resolution of the single-subject claim at all.

¶ 49 In *St. Paul* the petitioners challenged the constitutionality of a bill amending the revenue act under article II, sections 19, 37, and 38, "claim[ing] that the 1949 amendments changed the scope and object of the law as enacted in 1935 and the title of the amendatory act gave no notice of such a purpose." *St. Paul,* 40 Wash.2d at 355, 243 P.2d 474. Thus, the petitioners were challenging the amendatory act solely on the basis of its alleged violation

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[1] *St. Paul* was followed by this court on only four occasions, most recently 25 years ago, and with good reason: its holding has no basis in the constitution. "Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well." *Malyon v. Pierce County,* 131 Wash.2d 779, 799, 935 P.2d 1272 (1997). Article II, section 19 says, "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." Clearly, the plain text of our Constitution does not differentiate between "original" and "amendatory" bills. There is no principled reason, and the majority offers none, to forgo article II, section 19 analysis simply because a bill purports to amend another. This court should recognize what the past 25 years in our article II, section 19 jurisprudence indicate: *St. Paul* and its progeny undermine the constitutional provisions they purport to interpret, are inconsistent with subsequent precedent, and should be overruled.

of the subject-in-title rule, not the single-subject rule or both. This conclusion is reflected in the holding of that case:

> "If the title identifies and purports to amend a prior act, any matter properly connected with, or germane to, the subject expressed in the title of that act may be included in the body of the amendatory act. Any matter that could validly have been enacted as part of the original act under its title is considered germane. If the title of the original act is sufficient to embrace the matter contained in the amendatory act, *the sufficiency of the title of the latter will not be inquired into.*"

St. Paul, 40 Wash.2d at 355, 243 P.2d 474 (quoting 1 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 1908, at 345-46 (Frank E. Horack, Jr., ed. (3d ed.1943) (emphasis added))).

¶ 50 Because it is expressly limited to challenges to the sufficiency of only the title of an act, the holding of *St. Paul* is not relevant to Theo Jensen's single-subject claim. Since it is in violation of the single-subject rule, SHB 3055 is invalid in its entirety. *Kiga,* 144 Wash.2d at 828, 31 P.3d 659.

III. Article II, Section 19'S Subject-in-Title Rule

¶ 51 It is also argued SHB 3055 violates the subject-in-title rule. This rule requires the subject of a bill be expressed in its title. We have explained its practical application as follows:

> "The wisdom of the rule suggests itself, in that the reader, whether a member of the legislature

> or otherwise, may, by a mere glance at a few catch words in the title, be apprised of what the act treats, without further search. Does the title of the act in question contain such a statement of the subject-matter?"

Patrice, 136 Wash.2d at 852, 966 P.2d 1271 (quoting *State ex rel. Seattle Elec. Co. v. Superior Court,* 28 Wash. 317, 321, 68 P. 957 (1902)).

¶ 52 SHB 3055 states it is "AN ACT Relating to admissibility of DUI tests; amending RCW 46.61.506; reenacting and amending RCW 46.20.308 and 46.20.3101; and creating a new section." But that is *not* the "title" of SHB 3055 for the purposes of our analysis. "The title relevant to the article II, section 19 inquiry is the word, phrase, or phrases following 'AN ACT Relating to . . . ' and preceding the first semicolon." *State v. Thomas,* 103 Wash.App. 800, 808, 14 P.3d 854 (2000) (citing *Fray v. Spokane County,* 134 Wash.2d 637, 655, 952 P.2d 601 (1998); *Patrice,* 136 Wash.2d at 853, 966 P.2d 1271). Our analysis must focus on the narrative description of the bill, and not on the "ministerial recital of [its] sections." *Id.* at 809, 14 P.3d 854. "[A] 'mere reference to a section in the title of an act does not state a subject.' " *Fray,* 134 Wash.2d at 654-55, 952 P.2d 601 (quoting *State ex rel. Seattle Elec. Co.,* 28 Wash. at 325, 68 P. 957). The title of SHB 3055 is "*AN ACT Relating to admissibility of DUI tests.*" (Emphasis added.)

¶ 53 We next consider whether the title is general or restrictive. A general title is broad rather than narrow,

comprehensive and generic rather than specific.[2] *Amalgamated,* 142 Wash.2d at 207-08, 11 P.3d 762. Conversely, a restrictive title is one where "'a particular part or branch of a subject is carved out and selected as the subject of the legislation.'"[3] *State v. Broadaway,* 133 Wash.2d 118, 127, 942 P.2d 363 (1997) (quoting *Gruen v. State Tax Comm'n,* 35 Wash.2d 1, 23, 211 P.2d 651 (1949), *overruled on other grounds by State ex rel. State Fin. Comm. v. Martin,* 62 Wash.2d 645, 384 P.2d 833 (1963)).

¶ 54 In my view the title "AN ACT Relating to admissibility of DUI tests" is general. Mr. Jensen is correct to point out the title does not refer to all BAC (breath or blood alcohol concentration) tests; however this fact alone is not dispositive. The title of SHB 3055 meets the criteria of "[a] few well-chosen words, suggestive of the general subject stated," *State ex rel. Scofield v. Easterday,* 182 Wash. 209, 212, 46 P.2d 1052 (1935) and therefore constitutes a general title encompassing issues related to the *subject of admissibility of DUI tests.*

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[2] Examples of general titles include: "AN ACT Relating to violence prevention." *In re Boot,* 130 Wash.2d 553, 566, 925 P.2d 964, 971 (1996); "AN ACT Relating to Community Colleges." *Wash. Educ. Ass'n v. State,* 97 Wash.2d 899, 906-07, 652 P.2d 1347 (1982); "An Act Relating to the death penalty." *State v. Grisby,* 97 Wash.2d 493, 498, 647 P.2d 6 (1982); "An Act Relating to industrial insurance." *Wash. State Sch. Dirs. Ass'n v. Dep't of Labor & Indus.,* 82 Wash.2d 367, 371, 510 P.2d 818 (1973).

[3] Examples of restrictive titles include: "An Act Relating to increasing penalties for armed crimes." *Broadaway,* 133 Wash.2d at 123, 942 P.2d 363; "An Act Relating to the acquisition of property by public agencies." *Daviscourt v. Peistrup,* 40 Wash.App. 433, 437, 698 P.2d 1093 (1985); "AN ACT relating to the rights and disabilities of aliens with respect to land." *De Cano v. State,* 7 Wash.2d 613, 623, 110 P.2d 627 (1941).

¶ 55 As discussed above, the references to the sections of chapters 46.20 and 46.61 RCW that SHB 3055 reenacts and amends included after its title do *not* state a subject and are not part of subject-in-title analysis. *Fray,* 134 Wash.2d at 654-55, 952 P.2d 601 (citing *State ex rel. Seattle Elec. Co.,* 28 Wash. at 325, 68 P. 957). Consequently, the question before this court is whether a reader would be apprised of SHB 3055's subject matter by reading its title. *Patrice,* 136 Wash.2d at 852, 966 P.2d 1271. The answer is no.

¶ 56 Although "'[t]he title to a bill need not be an index to its contents; nor is the title expected to give the details contained in the bill,'" *Washington Federation of State Employees v. State,* 127 Wash.2d 544, 555, 901 P.2d 1028 (1995),[4] the bill's title must "lead to an inquiry into the body of the act, or indicate to an inquiring mind the scope and purpose of the law." *Young Men's Christian Ass'n v. State,* 62 Wash.2d 504, 506, 383 P.2d 497 (1963). Here, the title provides no indication SHB 3055, in addition to involving the admissibility of DUI tests, also includes provisions affecting search warrants for breath and blood, breath test machines in medical facilities, implied consent warnings, license sanctions, and procedural changes regarding the arrest of persons under 21 years of age. *See* SHB 3055, §§ 2, 3.

¶ 57 This court was confronted with a similar scenario in *Patrice.* There the challenged bill was entitled, "AN ACT Relating to court costs" but also included amendments requiring the appointment of interpreters to assist

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[4] Quoting *Treffry v. Taylor,* 67 Wash.2d 487, 491, 408 P.2d 269 (1965).

witnesses in various legal proceedings. Although these services would undoubtedly impact the court costs referenced in the title of the bill, this court nonetheless held article II, section 19 had been violated. Relying on *Fray* for the proposition that a "'mere reference to a section in the title of an act does not state a subject,'" *Fray,* 134 Wash.2d at 654-55, 952 P.2d 601 (quoting *State ex rel. Seattle Elec. Co.,* 28 Wash. at 325, 68 P. 957), we concluded the bill's subject was not expressed in its title because "'AN ACT Relating to court costs'" "fail[ed] to mention anything about the inclusion of provisions relating to qualified ASL [American Sign Language] interpreters, legal proceedings, police investigations, or arrests." *Patrice,* 136 Wash.2d at 853, 966 P.2d 1271.

¶ 58 The same analysis applies here. The title "AN ACT Relating to admissibility of DUI tests" fails to mention search warrants, breath test equipment, implied consent warnings, or license sanctions. In short, the title does not provide an indication of the scope and purpose of the law. Because it fails to meet this standard, the title of SHB 3055 violates the subject-in-title rule of article II, section 19 of the Washington Constitution. Sections not related to the subject of admissibility of DUI tests should therefore be struck down. *Patrice,* 136 Wash.2d at 852, 966 P.2d 1271.

¶ 59 The majority misidentifies the title of SHB 3055 when it holds the title expresses the bill's subject matter. As discussed above, the title of SHB 3055 for the purposes of evaluating its constitutionality under article II, section 19 is "AN ACT Relating to admissibility of DUI tests." *St. Paul* requires the title of the amendatory act to identify and purport to amend a prior act. *See St. Paul,* 40 Wash.2d at 355, 243 P.2d 474 ("'If *the title* identifies and purports to

amend a prior act . . . . '" (emphasis added) (quoting 1 J.G. SUTHERLAND, *supra,* § 1908)). "AN ACT Relating to admissibility of DUI tests" clearly does neither.

¶ 60 The majority attempts to shoehorn SHB 3055 into the *St. Paul* framework by including the recitation of the statutory provisions affected as part of its title, majority at 7, but doing so runs afoul of the rule that constitutional inquiries focus solely on the narrative description of the act. *Thomas,* 103 Wash.App. at 808, 14 P.3d 854 (citing *Fray,* 134 Wash.2d 637, 952 P.2d 601; *Patrice,* 136 Wash.2d 845, 966 P.2d 1271). Because the title of SHB 3055 does not identify and purport to amend a prior statute, an inquiry into its constitutionality is not barred by the holding of *St. Paul.*

IV. Legislative Invasion of Judicial Power

¶ 61 Mr. Jensen also argues SHB 3055 invades the article IV judicial power because it prevents the courts from determining the admissibility of BAC tests once the State has met its prima facie burden under subsection 4(4)(a) of SHB 3055.

¶ 62 "[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control . . . . "[5] An independent and vigilant judiciary is essential to the preservation of individual rights in the face of governmental encroachment, constituting what James Madison

[5] Baron De Montesquieu, *The Spirit of the Laws* 152 (Thomas Nugent, trans., Franz Neumann ed., Hafner Press 1949) (1748).

described as "'an impenetrable bulwark against every assumption of power in the legislative or executive.'"[6] Thus, the separation of powers doctrine ensures "fundamental functions of each branch remain inviolate." *Carrick v. Locke,* 125 Wash.2d 129, 135, 882 P.2d 173 (1994). Echoing the Founders' vision of an independent judiciary, the United States Supreme Court has explained,

> [T]he "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.

United States v. Nixon, 418 U.S. 683, 704, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (quoting THE FEDERALIST, NO. 47, at 313 (S. Mittell ed.1938)), *superseded by statute on other grounds by Bourjaily v. United States,* 483 U.S. 171, 179, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987).

¶ 63 Our constitution exclusively vests the judicial power in the courts, not the legislature: "The judicial power of the state shall be vested in a supreme court . . . ." WASH. CONST. art. IV, § 1. The judicial power is the

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[6] *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 83-84 (Helen E. Veit et al. eds., Johns Hopkins Univ. Press 1991) (quoting 1 Annals of Congress 439 (Joseph Gales ed., 1789)).

power to do that which the courts have traditionally done.[7] "This court has recognized the inherent power and obligation of the judiciary to control all its necessary functions to promote the effective administration of justice." *State v. Wadsworth,* 139 Wash.2d 724, 740, 991 P.2d 80 (2000). This inherent power includes determining the admissibility of evidence. *See, e.g., State v. Demery,* 144 Wash.2d 753, 758, 30 P.3d 1278 (2001) ("trial court has wide discretion to determine the admissibility of evidence"); *State v. Atsbeha,* 142 Wash.2d 904, 913, 16 P.3d 626 (2001) ("Admissibility of evidence generally is within the sound discretion of the trial court.") (citing *State v. Ellis,* 136 Wash.2d 498, 504, 963 P.2d 843 (1998)). "If the legislature attempted to . . . abolish or abridge the power of the courts, such an attempt would be unconstitutional and void." *Deskins v. Waldt,* 81 Wash.2d 1, 2-3, 499 P.2d 206 (1972) (citing *Blanchard v. Golden Age Brewing Co.,* 188 Wash. 396, 63 P.2d 397 (1936)). Yet surrender of judicial independence is precisely what the majority does when it upholds a bill shackling the power of the courts to do that which the courts have traditionally done: Determine the admissibility of evidence.

¶ 64 Courts are vested with "the inherent power to govern court procedures." *State v. Fields,* 85 Wash.2d 126, 129, 530 P.2d 284 (1975).[8] "When a court rule and a statute

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[7] Richard B. Sanders, *Battles for the State Constitution: A Dissenter's View,* 37 Gonz. L.Rev. 1, 8, (2001/02) (quoting "'What the judicial power is, is what the judicial power has been.'" Justice Antonin Scalia, Oral Remarks at the Federalist Society Separation of Powers Seminar, Durango, Colo. (Sept. 28, 2001)).

[8] The majority asserts the power to promulgate the rules of evidence "is a legislatively delegated power of the judiciary." Majority at 781. Surely the majority is not suggesting that had RCW 2.04.190 not been enacted, we would be powerless to adopt rules of evidence. Our power to decide the admissibility of evidence stems from the constitu-

(Continued on following page)

conflict, the nature of the right at issue determines which one controls." *State v. W.W.*, 76 Wash.App. 754, 758, 887 P.2d 914 (1995). "If the right is substantive, then the statute prevails; if it is procedural, then the court rule prevails." *Id.* The admissibility of evidence is a procedural matter.[9] The resolution of this claim turns on whether the language of SHB 3055 is permissive, preserving the courts' authority to exclude BAC test results under the rules of evidence, or mandatory, in which case it would be invalid. *State v. Zwicker*, 105 Wash.2d 228, 238, 713 P.2d 1101 (1986). SHB 3055 provides:

> Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. *Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection.* Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

SHB 3055, subsection 4(4)(c) (emphasis added).

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tion, independently of any auxiliary statutory authority. *See Fields*, 85 Wash.2d at 129, 530 P.2d 284. The legislature has no judicial power to delegate.

[9] *Commonwealth v. Alexander*, 5 S.W.3d 104, 106 (Ky.1999) ("The admissibility of evidence is governed by the Kentucky Rules of Evidence and is procedural in nature."); *Hrouda v. Winne*, 112 A.D.2d 304, 305, 491 N.Y.S.2d 749 (N.Y.App.Div.1985) ("Rules governing the admissibility of evidence are procedural matters."); *Kerr v. Palmieri*, 325 Mass. 554, 557, 91 N.E.2d 754 (1950) ("statute relat[ing] to the admissibility of evidence is . . . procedural").

¶ 65 According to the majority SHB 3055 is permissive because it "does not state [BAC] tests must be admitted if a prima facie burden is met; it states that such tests are *admissible.*" Majority at 18. This conclusion is untenable when one considers the plain text of subsections 4(4)(a) and 4(4)(c). Subsection 4(4)(a) of SHB 3055 provides breath tests "shall be admissible at trial" once the State produces prima facie evidence to meet certain enumerated criteria concerning the administration of such tests.[10] Under subsection 4(4)(c), once the State meets its prima facie burden, a defendant may not challenge the admissibility of the BAC test results on the grounds of "reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures."

¶ 66 The sole recourse under this statute for a defendant confronted with an inaccurate and unreliable test result is to argue diminished weight should be given by the trier of fact, not to contest its admissibility.[11] These provisions clearly preclude challenges to the admissibility of BAC test results on reliability and accuracy grounds once the requirements of subsection 4(4)(a) are met. Consequently, these provisions conflict with the courts'

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[10] Subsection 4(4)(a) states, "[a] breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence . . . ."

[11] Such prohibition on challenges to the admissibility of BAC test results is apparently precisely what the legislature had in mind in enacting SHB 3055. As the final bill report for both the House and the Senate clearly states, "Defense challenges to the reliability or accuracy of a breath test *may not be used to prevent the introduction of the evidence* once the prosecution has made a *prima facie* case." Final B. Rep. on SHB 3055, at 3 (emphasis added).

judicial power to determine the admissibility of evidence pursuant to our rules of evidence.

¶ 67 To bolster its assertion SHB 3055 is permissive in nature, the majority relies on *Zwicker* and *State v. Long,* 113 Wash.2d 266, 778 P.2d 1027 (1989). This reliance is misplaced. The statutory provision at issue in those cases, RCW 46.61.517, read, "The refusal of a person to submit to a test of the alcoholic content of his blood under RCW 46.20.308 is admissible into evidence at a subsequent criminal trial." Laws of 1983, ch. 165, § 27. Critically, and unlike SHB 3055, the above language did not restrict the courts' ability to exclude evidence on the basis of its relevance or its probative value if outweighed by the danger of unfair prejudice by restricting such challenges only to the question of the weight of the evidence. In *Zwicker* we held the statute at issue was valid, interpreting "is admissible" as permissive and not mandating admissibility in all cases. *Zwicker,* 105 Wash.2d at 238, 713 P.2d 1101. However, we also cautioned that "any conflict with ER 401 and 403 . . . *would require invalidation of the statute.*" *Id.* (emphasis added).

¶ 68 SHB 3055 strips the court of its essential judicial power to exclude inadmissible evidence. We must defend the power and independence of the judiciary, not rush to surrender it to the legislative or executive branch.[12]

V. Conclusion

¶ 69 "Article II, section 19 serves to protect serious constitutional interests." *Patrice,* 136 Wash.2d at 851, 966

[12] Sanders, *supra* note 7, at 5.

P.2d 1271. The majority twice misapplies the requirements of article II section 19: first, it erroneously circumvents the need for an inquiry into the substantive provisions of SHB 3055 under the single-subject rule, and second it ignores precedent defining "title" for the purposes of article II, section 19 analysis. The majority then hastens to surrender our independence from the legislative and executive branches in the face of a conspicuous intrusion into the independent judicial power to exclude unreliable and unfairly prejudicial evidence.

¶ 70 I dissent.

Dissenting: J.M. JOHNSON, JJ.

APPENDIX B

IN THE FIRCREST MUNICIPAL COURT
IN AND FOR THE STATE OF WASHINGTON

CITY OF FIRCREST, Plaintiff, vs. THEO JENSEN, Defendant.	76738-6 NO: C37915 CONCLUSIONS OF LAW ON DEFENDANT'S MOTION TO SUPPRESS AND DISMISS

THIS MATTER having come before the court on the 5th of January, 2005 for a hearing pursuant to Defendant's Motion to Suppress and Dismiss, the court having read the briefs of the parties and having heard the arguments of counsel, and having reviewed the files and records herein, makes the following:

CONCLUSIONS OF LAW

I.

The title of SHB 3055 relevant to the Article II, section 19 analysis, is "AN ACT Relating to admissibility of DUI tests; amending RCW 46.61.506; reenacting and amending RCW 46.20.308 and 46.20.3101; and creating a new section." The title is general, not restrictive.

II.

Because the 2004 amendments (SHB 3055) expressly state that they amend RCW 46.61.506 in Title 46, and the scope of the original 1961 act encompasses the 2004 amendments, there is no violation of Article II, section 19 of the State Constitution.

III.

The single-subject-in-title rule of Article II, section 19 is not violated because all subjects within the 2004 amendments are properly encompassed within the terms of the original 1961 act broadly governing motor vehicles.

IV.

The 2004 amendments (SHB 3055) do not violate the separation of powers doctrine because the amendments do not conflict with the court's rules of evidence. The prosecution remains bound by both the procedural rules of the 2004 amendments and the Evidence Rules. Because the legislature has the authority to promulgate substantive rules, the amendments to RCW 46.61.506 do not violate the separation of powers.

V.

SHB 3055 does not violate the separation of powers doctrine because the 2004 amendments codify, but do not alter Washington's law regarding the standard of proof for admission of evidence.

VI.

The 2004 amendments (SHB 3055) do not establish a mandatory rebuttable presumption in violation of due process under the state and federal constitutions because the 2004 amendments do not concern any issue before the jury, they have no effect upon the burden of proof to the jury. ~~and do not require the defense to perform any task at trial~~. [/s/ [Illegible]]

VII.

The Defendant's Motion to Suppress and Dismiss is denied.

DONE IN OPEN COURT this 2 day of March, 2005.

/s/ [Illegible]
JUDGE of the Municipal Court

Presented by:

/s/ Michael B. Smith
Michael B. Smith, WSBA# 13747
Prosecuting Attorney

Copy Received and Approved as to Form

/s/ [Illegible]
Linda M. Callahan, WSBA #26274
Attorney for Defendant

APPENDIX C

RCW 46.61.506. Persons under influence of intoxicating liquor or drug - Evidence - Tests - Information concerning tests

(1) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug, if the person's alcohol concentration is less than 0.08, it is evidence that may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor or any drug.

(2) The breath analysis shall be based upon grams of alcohol per two hundred ten liters of breath. The foregoing provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor or any drug.

(3) Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose. The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.

(4)(a) A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:

(i) The person who performed the test was authorized to perform such test by the state toxicologist;

(ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;

(iii) The person being tested did not have any foreign substances; not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;

(iv) Prior to the start of the test, the temperature of the simulator solution as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade;

(v) The internal standard test resulted in the message "verified";

(vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist;

(vii) The simulator external standard result did lie between .072 to .088 inclusive; and

(viii) All blank tests gave results of .000.

(b) For purposes of this section, "prima facie evidence" is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts

sought to be proved. In assessing whether there is sufficient evidence of the foundational facts, the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.

(c) Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

(5) When a blood test is administered under the provisions of RCW 46.20.308, the withdrawal of blood for the purpose of determining its alcoholic or drug content may be performed only by a physician, a registered nurse, a licensed practical nurse, a nursing assistant as defined in chapter 18.88A RCW, a physician assistant as defined in chapter 18.71A RCW, a first responder as defined in chapter 18.73 RCW, an emergency medical technician as defined in chapter 18.73 RCW, a health care assistant as defined in chapter 18.135 RCW, or any technician trained in withdrawing blood. This limitation shall not apply to the taking of breath specimens.

(6) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his or her own choosing administer one or more tests in addition to any administered at the

direction of a law enforcement officer. The test will be admissible if the person establishes the general acceptability of the testing technique or method. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

(7) Upon the request of the person who shall submit to a test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or her or his or her attorney.

APPENDIX D

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 3055

Chapter 68, Laws of 2004

58th Legislature
2004 Regular Session

DUI TEST ADMISSIBILITY

EFFECTIVE DATE: 6/10/04

Passed by the House
February 12, 2004
Yeas 93 Nays 0

FRANK CHOPP
Speaker of the House of Representatives

Passed by the Senate
March 2, 2004
Yeas 48 Nays 0

BRAD OWEN
President of the Senate

Approved March 22, 2004.

GARY F. LOCKE
Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 3055** as passed by the House of Representatives and the Senate on the dates hereon set forth.

RICHARD NAFZIGER
Chief Clerk

FILED

March 22, 2004 – 5:14 p.m.

Secretary of State
State of Washington

SUBSTITUTE HOUSE BILL 3055

Passed Legislature – 2004 Regular Session

58th Legislature

State of Washington **2004 Regular Session**

By House Committee on Judiciary (originally sponsored by Representatives Holmquist, Carrell and O'Brien)

READ FIRST TIME 02/06/04.

AN ACT Relating to admissibility of DUI tests; amending RCW 46.61.506; reenacting and amending RCW 46.20.308 and 46.20.3101; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature finds that previous attempts to curtail the incidence of driving while intoxicated have been inadequate. The legislature further finds that property loss, injury, and death caused by drinking drivers continue at unacceptable levels. This act is intended to convey the seriousness with which the legislature views this problem. To that end the legislature seeks to ensure swift and certain consequences for those who drink and drive.

To accomplish this goal, the legislature adopts standards governing the admissibility of tests of a person's blood or breath. These standards will provide a degree of uniformity that is currently lacking, and will reduce the delays caused by challenges to various breath test instrument components and maintenance procedures. Such challenges, while allowed, will no longer go to admissibility of test results. Instead, such challenges are to be considered by the finder of the fact in deciding what weight to place upon an admitted blood or breath test result.

The legislature's authority to adopt standards governing the admissibility of evidence involving alcohol is well established by the Washington Supreme Court. See generally *State v. Long,* 113 Wn.2d 266, 778 P.2d 1027 (1989); *State v. Sears,* 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); *State v. Pavelich,* 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantive law").

Sec. 2. RCW 46.20.308 and 1999 c 331 s 2 and 1999 c 274 s 2 are each reenacted and amended to read as follows:

(1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503. Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.

(2) The test or tests of breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or the person to have been driving or in actual physical control of a motor vehicle while having alcohol in

a concentration in violation of RCW 46.61.503 in his or her system and being under the age of twenty-one. However, in those instances where the person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample or where the person is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility ((~~in which a breath testing instrument is not present~~)) or where the officer has reasonable grounds to believe that the person is under the influence of a drug, a blood test shall be administered by a qualified person as provided in RCW 46.61.506(((~~4~~))) (5). The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. ((~~The officer shall warn the driver that:~~

~~(a) His or her license, permit, or privilege to drive will be revoked or denied if he or she refuses to submit to the test;~~

~~(b) His or her license, permit, or privilege to drive will be suspended, revoked, or denied if the test is administered and the test indicates the alcohol concentration of the person's breath or blood is 0.08 or more, in the case of a person age twenty one or over, or in violation of RCW 46.61.502, 46.61.503, or 46.61.504 in the case of a person under age twenty one; and~~

~~(c) His or her refusal to take the test may be used in a criminal trial.~~)) The officer shall warn the driver, in substantially the following language, that:

(a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and

(b) If the driver refuses to take the test, the driver will not be eligible for an occupational permit; and

(c) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and

(d) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 or more, or if the driver is under age twenty-one and the test indicates the alcohol concentration of the driver's breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504.

(3) Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW 46.61.52O or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested.

(4) Any person who is dead, unconscious, or who is otherwise in a condition rendering him or her incapable of

refusal, shall be deemed not to have withdrawn the consent provided by subsection (1) of this section and the test or tests may be administered, subject to the provisions of RCW 46.61.506, and the person shall be deemed to have received the warnings required under subsection (2) of this section.

(5) If, following his or her arrest and receipt of warnings under subsection (2) of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test or tests of his or her breath or blood, no test shall be given except as authorized under subsection (3) or (4) of this section.

(6) If, after arrest and after the other applicable conditions and requirements of this section have been satisfied, a test or tests of the person's blood or breath is administered and the test results indicate that the alcohol concentration of the person's breath or blood is 0.08 or more if the person is age twenty-one or over, or ((~~is in violation of RCW 46.61.502, 46.61.503, or 46.61.504~~)) 0.02 or more if the person is under the age of twenty-one, or the person refuses to submit to a test, the arresting officer or other law enforcement officer at whose direction any test has been given, or the department, where applicable, if the arrest results in a test of the person's blood, shall:

(a) Serve notice in writing on the person on behalf of the department of its intention to suspend, revoke, or deny the person's license, permit, or privilege to drive as required by subsection (7) of this section;

(b) Serve notice in writing on the person on behalf of the department of his or her right to a hearing, specifying the steps he or she must take to obtain a hearing as provided by subsection (8) of this section;

(c) Mark the person's Washington state driver's license or permit to drive, if any, in a manner authorized by the department;

(d) Serve notice in writing that the marked license or permit, if any, is a temporary license that is valid for sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or until the suspension, revocation, or denial of the person's license, permit, or privilege to drive is sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first. No temporary license is valid to any greater degree than the license or permit that it replaces; and

(e) Immediately notify the department of the arrest and transmit to the department within seventy-two hours, except as delayed as the result of a blood test, a sworn report or report under a declaration authorized by RCW 9A.72.085 that states:

(i) That the officer had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or was under the age of twenty-one years and had been driving or was in actual physical control of a motor vehicle while having an alcohol concentration in violation of RCW 46.61.503;

(ii) That after receipt of the warnings required by subsection (2) of this section the person refused to submit to a test of his or her blood or breath, or a test was administered and the results indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person is age twenty-one or over, or was ((~~in violation~~

~~of RCW 46.61.502, 46.61.503, or 46.61.504~~)) 0.02 or more if the person is under the age of twenty-one; and

(iii) Any other information that the director may require by rule.

(7) The department of licensing, upon the receipt of a sworn report or report under a declaration authorized by RCW 9A.72.085 under subsection (6)(e) of this section, shall suspend, revoke, or deny the person's license, permit, or privilege to drive or any nonresident operating privilege, as provided in RCW 46.20.3101, such suspension, revocation, or denial to be effective beginning sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or where sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first.

(8) A person receiving notification under subsection (6)(b) of this section may, within thirty days after the notice has been given, request in writing a formal hearing before the department. The person shall pay a fee of one hundred dollars as part of the request. If the request is mailed, it must be postmarked within thirty days after receipt of the notification. Upon timely receipt of such a request for a formal hearing, including receipt of the required one hundred dollar fee, the department shall afford the person an opportunity for a hearing. The department may waive the required one hundred dollar fee if the person is an indigent as defined in RCW 10.101.010. Except as otherwise provided in this section, the hearing is subject to and shall be scheduled and conducted in accordance with RCW 46.20.329 and 46.20.332. The hearing shall be conducted in the county of the arrest, except that

all or part of the hearing may, at the discretion of the department, be conducted by telephone or other electronic means. The hearing shall be held within sixty days following the arrest or following the date notice has been given in the event notice is given by the department following a blood test, unless otherwise agreed to by, the department and the person, in which case the action by the department shall be stayed, and any valid temporary license marked under subsection (6)(c) of this section extended, if the person is otherwise eligible for licensing. For the purposes of this section, the scope of the hearing shall cover the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration ((~~in violation of RCW 46.61.503 and~~)) of 0.02 or more if the person was under the age of twenty-one, whether the person was placed under arrest, and (a) whether the person refused to submit to the test or tests upon request of the officer after having been informed that such refusal would result in the revocation of the person's license, permit, or privilege to drive, or (b) if a test or tests were administered, whether the applicable requirements of this section were satisfied before the administration of the test or tests, whether the person submitted to the test or tests, or whether a test was administered without express consent as permitted under this section, and whether the test or tests indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person was age twenty-one or over at the time of the arrest, or ((~~was in violation of RCW 46.61.502, 46.61.503, or 46.61.504~~)) 0.02 or more if the

person was under the age of twenty-one at the time of the arrest. The sworn report or report under a declaration authorized by RCW 9A.72.085 submitted by a law enforcement officer is prima facie evidence that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or the person had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration ((~~in violation of RCW 46.61.503~~)) of 0.02 or more and was under the age of twenty-one and that the officer complied with the requirements of this section.

A hearing officer shall conduct the hearing, may issue subpoenas for the attendance of witnesses and the production of documents, and shall administer oaths to witnesses. The hearing officer shall not issue a subpoena for the attendance of a witness at the request of the person unless the request is accompanied by the fee required by RCW 5.56.010 for a witness in district court. The sworn report or report under a declaration authorized by RCW 9A.72.085 of the law enforcement officer and any other evidence accompanying the report shall be admissible without further evidentiary foundation and the certifications authorized by the criminal rules for courts of limited jurisdiction shall be admissible without further evidentiary foundation. The person may be represented by counsel, may question witnesses, may present evidence, and may testify. The department shall order that the suspension, revocation, or denial either be rescinded or sustained.

(9) If the suspension, revocation, or denial is sustained after such a hearing, the person whose license,

privilege, or permit is suspended, revoked, or denied has the right to file a petition in the superior court of the county of arrest to review the final order of revocation by the department in the same manner as an appeal from a decision of a court of limited jurisdiction. Notice of appeal must be filed within thirty days after the date the final order is served or the right to appeal is waived. Notwithstanding RCW 46.20.334, RALJ 1.1, or other statutes or rules referencing de novo review, the appeal shall be limited to a review of the record of the administrative hearing. The appellant must pay the costs associated with obtaining the record of the hearing before the hearing officer. The filing of the appeal does not stay the effective date of the suspension, revocation, or denial. A petition filed under this subsection must include the petitioner's grounds for requesting review. Upon granting petitioner's request for review, the court shall review the department's final order of suspension, revocation, or denial as expeditiously as possible. The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determinations supported by substantial evidence in the record: (a) That were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department. The superior court may reverse, affirm, or modify the decision of the department or remand the case back to the department for further proceedings. The decision of the superior court must be in writing and filed in the clerk's office with the other papers in the case. The court shall state the reasons for the decision. If judicial relief is sought for a stay or other temporary remedy from the department's action, the court shall not grant such relief unless the court finds that the appellant is likely to prevail in the appeal and that without a stay the appellant

will suffer irreparable injury. If the court stays the suspension, revocation, or denial it may impose conditions on such stay.

(10) If a person whose driver's license, permit, or privilege to drive has been or will be suspended, revoked, or denied under subsection (7) of this section, other than as a result of a breath or blood test refusal, and who has not committed an offense for which he or she was granted a deferred prosecution under chapter 10.05 RCW, petitions a court for a deferred prosecution on criminal charges arising out of the arrest for which action has been or will be taken under subsection (7) of this section, the court may direct the department to stay any actual or proposed suspension, revocation, or denial for at least forty-five days but not more than ninety days. If the court stays the suspension, revocation, or denial, it may impose conditions on such stay. If the person is otherwise eligible for licensing, the department shall issue a temporary license, or extend any valid temporary license marked under subsection (6) of this section, for the period of the stay. If a deferred prosecution treatment plan is not recommended in the report made under RCW 10.05.050, or if treatment is rejected by the court, or if the person declines to accept an offered treatment plan, or if the person violates any condition imposed by the court, then the court shall immediately direct the department to cancel the stay and any temporary marked license or extension of a temporary license issued under this subsection.

A suspension, revocation, or denial imposed under this section, other than as a result of a breath or blood test refusal, shall be stayed if the person is accepted for deferred prosecution as provided in chapter 10.05 RCW for the incident upon which the suspension, revocation, or

denial is based. If the deferred prosecution is terminated, the stay shall be lifted and the suspension, revocation, or denial reinstated. If the deferred prosecution is completed, the stay shall be lifted and the suspension, revocation, or denial canceled.

(11) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has been suspended, revoked, or denied, the department shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he or she has a license.

Sec. 3. RCW 46.20.3101 and 1998 c 213 s 2, 1998 c 209 s 2, and 1998 c 207 s 8 are each reenacted and amended to read as follows:

Pursuant to RCW 46.20.308, the department shall suspend, revoke, or deny the arrested person's license, permit, or privilege to drive as follows:

(1) In the case of a person who has refused a test or tests:

(a) For a first refusal within seven years, where there has not been a previous incident within seven years that resulted in administrative action under this section, revocation or denial for one year;

(b) For a second or subsequent refusal within seven years, or for a first refusal where there has been one or more previous incidents within seven years that have resulted in administrative action under this section, revocation or denial for two years or until the person reaches age twenty-one, whichever is longer. A revocation imposed under this subsection (1)(b) shall run consecutively to the

period of any suspension, revocation, or denial imposed pursuant to a criminal conviction arising out of the same incident.

(2) In the case of an incident where a person has submitted to or been administered a test or tests indicating that the alcohol concentration of the person's breath or blood was 0.08 or more:

(a) For a first incident within seven years, where there has not been a previous incident within seven years that resulted in administrative action under this section, suspension for ninety days;

(b) For a second or subsequent incident within seven years, revocation or denial for two years.

(3) In the case of an incident where a person under age twenty-one has submitted to or been administered a test or tests indicating that the alcohol concentration of the person's breath or blood was ((~~in violation of RCW 46.61.502, 46.61.503, or 46.61.504~~)) 0.02 or more:

(a) For a first incident within seven years, suspension or denial for ninety days;

(b) For a second or subsequent incident within seven years, revocation or denial for one year or until the person reaches age twenty-one, whichever is longer.

Sec. 4. RCW 46.61.506 and 1998 c 213 s 6 are each amended to read as follows:

(1) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of intoxicating liquor

or any drug, if the person's alcohol concentration is less than 0.08, it is evidence that may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor or any drug.

(2) The breath analysis shall be based upon grams of alcohol per two hundred ten liters of breath. The foregoing provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor or any drug.

(3) Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose. The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to ascertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.

(4)(a) A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:

(i) The person who performed the test was authorized to perform such test by the state toxicologist;

(ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;

(iii) The person being tested did not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;

(iv) Prior to the start of the test, the temperature of the simulator solution as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 decrees centigrade;

(v) The internal standard test resulted in the message "verified";

(vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist;

(vii) Simulator external standard result did lie between .072 to .088 inclusive; and

(viii) All blank tests gave results of .000.

(b) For purposes of this section, "prima facie evidence" is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the foundational facts, the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.

(c) Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

(5) When a blood test is administered under the provisions of RCW 46.20.308, the withdrawal of blood for the purpose of determining its alcoholic or drug content may be performed only by a physician, a registered nurse, ((~~or a qualified technician~~)) a licensed practical nurse, a nursing assistant as defined in chapter 18.88A RCW, a physician assistant as defined in chapter 18.71A RCW, a first responder as defined in chapter 18.73 RCW, an emergency medical technician as defined in chapter 18.73 RCW, a health care assistant as defined in chapter 18.135 RCW, or any technician trained in withdrawing blood. This limitation shall not apply to the taking of breath specimens.

(((~~5~~))) (6) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his or her own choosing administer one or more tests in addition to any administered at the direction of a law enforcement officer. The test will be admissible if the person establishes the general acceptability of the testing technique or method. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

(((~~6~~))) (7) Upon the request of the person who shall submit to a test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or her or his or her attorney.

Passed by the House February 12, 2004.
Passed by the Senate March 2, 2004.
Approved by the Governor March 22, 2004.
Filed in Office of Secretary of State March 22, 2004.

APPENDIX E

OFFICIAL VOTERS PAMPHLET

GENERAL ELECTION
TUESDAY, NOVEMBER 5, 1968

Candidates Pamphlet Enclosed

INITIATIVE MEASURE 242

*Official ballot title:**

DRIVERS' IMPLIED CONSENT – INTOXICATION TESTS

AN ACT providing that any person operating a motor vehicle on the public highways shall be deemed to have consented to a breath test (if unconscious a blood test) to determine intoxication, when arrested for any offense, provided the arresting officer has reasonable grounds to believe such operator was driving or in control of a vehicle while intoxicated; directing a six-month revocation of driving privileges for a person refusing such test after having been advised of his rights and consequences of refusal; providing hearing and appeal procedures; and reducing the blood alcohol percentage necessary to raise a presumption of intoxication.

Statement FOR

Initiative 242 increases public safety on our highways

Motor vehicle registration in Washington has jumped 39% since 1960. Our highways are dangerously congested

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* Ballot Title as issued by the Attorney General.

and only alert drivers who can react quickly to driving hazards should be allowed to drive on them. The Washington State Patrol reports that over half of last year's highway fatalities involved alcohol. Based on highway mishap research conducted over the past 35 years, the United States Secretary of Transportation, Alan S. Boyd, reported to Congress in August, 1968, "Alcohol has been found to be the largest single factor leading to fatal crashes."

The moderate drinker is not affected by Initiative 242

The person who drinks the equivalent of seven or more ounces of 80-proof whiskey within an hour on an empty stomach and then drives, is the target of Initiative 242. (This is based upon an average male subject of 150 pounds.) The social drinker, such as one who has a few drinks and wine before and during dinner, is generally within the proposed limits.

Breath tests are fair and accurate

Qualified technicians who are trained and authorized under the supervision of the state toxicologist will give breath tests. At 0.15% (150 mg) the driver suffers severe impairment of physical and mental functions. The proposed 0.10% (100 mg) is more realistic. The test protects those who have a condition causing symptoms similar to those of intoxication.

Constitutional rights are protected

The United States Supreme Court has ruled implied consent legislation does not infringe on constitutional

freedoms since it seeks only physical evidence. (A comparable example of physical evidence is finger-printing.) The American Bar Association supports Implied Consent and lowering alcohol limits.

Twenty-seven states, including Oregon and California, have Implied Consent. Legislation similar to Initiative 242 passed in the House of Representatives in 1967, but never came to a vote in the Senate. This initiative is presented to the people because we cannot afford to wait longer for protection from the drunken driver.

Vote FOR 242 – Implied Consent!

Committee appointed to compose statement **FOR** *Initiative 242:*

AL HENRY, Senator, 17th Legislative District; NORWOOD CUNNINGHAM, Representative, 30th Legislative District; NAT WASHINGTON, Senator, 13th Legislative District.

Advisory Committee: DANIEL J. EVANS, Governor, State of Washington; RAYMOND A. NORWOOD, Corporate Director of Safety, The Boeing Company; REV. EVERETT J. JENSEN, General Secretary, Washington-Northern Idaho Council of Churches; DAVID C. GUILBERT, Chairman, Legislative Activities, Inland Automobile Association; DR. CHARLES P. LARSON, Vice President, Washington State Medical Association.

Explanatory comment issued by the Attorney General as required by law

The Law as it now exists:

Under existing state law, a person operating a motor vehicle on the public highways of this state is not, thereby,

deemed to have consented to any sort of chemical test to determine the alcoholic content of his blood. However, if a person voluntarily submits to such a test, the results of the test are admissible in any criminal proceedings relating to driving a motor vehicle while under the influence of intoxicating liquor. By statute it is presumed that the defendant was under the influence of intoxicating liquor if the amount of alcohol in his blood was 0.15% or more by weight of alcohol. If the test indicates 0.05% or less blood alcohol content then it is presumed that the defendant was not under the influence of intoxicating liquor.

Effect of Initiative Measure No. 242 if approved into Law:

The proposed act provides that any person operating a motor vehicle on the public highways of this state shall be deemed to have consented to a breath test (if unconscious, a blood test) to determine the extent of his intoxication, when arrested for any offense, providing the arresting officer has reasonable grounds to believe that such person was driving or in control of a vehicle while under the influence of intoxicating liquor. A person who refuses such a test after having been advised of his rights and the consequences of such refusal would be subject to a six-month revocation of his driving privileges. The act also provides for hearing and appeal procedures.

In addition, the proposed act reduces the amount of blood alcohol percentage necessary to raise a presumption of being under the influence of intoxicating liquor from 0.15% to 0.10%, and makes both the presumption of intoxication and the presumption of nonintoxication applicable in

civil as well as criminal actions or proceedings: *Provided*, the breath test or blood test, as the case may be, is given by a person qualified under the act to administer such tests.

Note: Complete text of Initiative Measure No. 242 starts on Page 36.

Statement AGAINST

No member of the 1967 Legislature or any responsible statewide organization could be enlisted to write a statement against Initiative Measure No. 242 for publication in this pamphlet.

COMPLETE TEXT OF

INITIATIVE MEASURE 242

Ballot Title as issued by the Attorney General:

DRIVERS' IMPLIED CONSENT – INTOXICATION TESTS

AN ACT providing that any person operating a motor vehicle on the public highways shall be deemed to have consented to a breath test (if unconscious a blood test) to determine intoxication, when arrested for any offense, provided the arresting officer has reasonable grounds to believe such operator was driving or in control of a vehicle while intoxicated; directing a six-month revocation of driving privileges for a person refusing such test after having been advised of his rights and consequences of refusal; providing hearing and appeal procedures; and reducing the blood alcohol percentage necessary to raise a presumption of intoxication.

Be it enacted by the people of the State of Washington:

NEW SECTION. Section 1. There is added to chapter 46.20 RCW a new section to read as follows:

(1) Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent, subject to the provisions of section 3 of this initiative, to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle upon the public highways of this state while under the influence of intoxicating liquor. Such officer shall inform the person of his right to refuse the test, and of his right to have additional tests administered by any qualified person of his choosing as provided in section 3 of this initiative. The officer shall warn the driver that his privilege to drive will be revoked or denied if he refuses to submit to the test. Unless the person to be tested is unconscious, the chemical test administered shall be of his breath only.

(2) Any person who is dead, unconscious or who is otherwise in a condition, rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection (1) of this section and the test or tests may be administered, subject to the provisions of section 3 of this initiative.

(3) If, following his arrest, the person arrested refuses upon the request of a law enforcement officer to submit to a chemical test of his breath, after being informed that his refusal will result in the revocation or denial of his privilege to drive, no test shall be given. The department of motor vehicles, upon the receipt of a sworn report of the law enforcement officer that he had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle upon the public highways of this state while under the influence of intoxicating liquor and that the person had refused to submit to the test upon the request of the law enforcement officer after being informed that such refusal would result in the revocation or denial of his privilege to drive, shall revoke his license or permit to drive or any nonresident operating privilege. If the person is a resident without a license or permit to operate a motor vehicle in this state, the department shall deny to the person the issuance of a license or permit for a period of six months after the date of the alleged violation, subject to review as hereinafter provided.

(4) Upon revoking the license or permit to drive or the nonresident operating privilege of any person, or upon determining that the issuance of a license or permit shall be denied to the person, as hereinbefore in this section directed, the department shall immediately notify the person involved in writing by personal service or by registered or certified mail of its decision and the grounds therefor, and of his right to a hearing, specifying the steps he must take to obtain a hearing. The person upon receiving such notice may, in writing and within ten days therefrom request a formal hearing. Upon receipt of such request, the department shall afford him an opportunity

for a hearing as provided in RCW 46.20.329 and RCW 46.20.332. The scope of such hearing for the purposes of this section shall cover the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle upon the public highways of this state while under the influence of intoxicating liquor, whether the person was placed under arrest and whether he refused to submit to the test upon request of the officer after having been informed that such refusal would result in the revocation or denial of his privilege to drive. The department shall order that the revocation or determination that there should be a denial of issuance either be rescinded or sustained. Any decision by the department revoking a person's driving privilege shall be stayed and shall not take effect while a formal hearing is pending as herein provided or during the pendency of a subsequent appeal to superior court: *Provided*, That this stay shall be effective only so long as there is no conviction for a moving violation during pendency of the hearing and appeal.

(5) If the revocation or determination that there should be a denial of issuance is sustained after such a hearing, the person whose license, privilege or permit is so affected shall have the right to file a petition in the superior court of the county wherein he resides, or, if a nonresident of this state, where the charge arose, to review the final order of revocation or denial by the department in the manner provided in RCW 46.20.334.

(6) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has been revoked, the department shall give information in writing of the action taken to the motor vehicle administrator of the state of the

person's residence and of any state in which he has a license.

Sec. 2. Section 27, chapter 121, Laws of 1965 extraordinary session as last amended by section 5, chapter 167. Laws of 1967 and RCW 46.20.311 are each amended to read as follows:

(1) The department shall not suspend a driver's license or privilege to drive a motor vehicle on the public highways for a fixed period of more than one year, except as permitted under RCW 46.20.342. Whenever the license of any person is suspended by reason of a conviction or pursuant to RCW 46.20.291, such suspension shall remain in effect and the department shall not issue to such person any new or renewal of license until such person shall give and thereafter maintain proof of financial responsibility for the future as provided in chapter 46.29 RCW.

(2) Any person whose license or privilege to drive a motor vehicle on the public highways has been revoked shall not be entitled to have such license or privilege renewed or restored unless the revocation was for a cause which has been removed, except that after the expiration of *six months in cases of revocation for refusal to submit to a chemical test under the provisions of section 1 of this initiative, and in all other revocation cases after expiration of* one year from the date on winch the revoked license was surrendered to and received by the department, such person may make application for a new license as provided by law, but the department shall not then issue a new license unless it is satisfied after investigation of the driving ability of such person that it will be safe to grant the privilege of driving a motor vehicle on the public highways, and until such person shall give and thereafter

maintain proof of financial responsibility for the future as provided in chapter 46.29 RCW.

NEW SECTION. Sec. 3. There is added to chapter 46.61 RCW a new section to read as follows:

(1) It is unlawful for any person who is under the influence of or affected by the use of intoxicating liquor or of any narcotic drug to drive or be in actual physical control of a vehicle within this state.

(2) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of his blood, breath or other bodily substance shall give rise to the following presumptions:

(a) If there was at that time 0.05 per cent or less by weight of alcohol in the person's blood, it shall be presumed that he was not under the influence of intoxicating liquor.

(b) If there was at that time in excess of 0.05 per cent but less than 0.10 per cent by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.

(c) If there was at that time 0.10 per cent or more by weight of alcohol in the person's blood, it shall be presumed that he was under the influence of intoxicating liquor.

(d) Per cent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood.

(e) The foregoing provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of intoxicating liquor.

(3) Chemical analysis of the person's blood or breath to be considered valid under the provisions of this section shall have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose. The state toxicologist is directed to approve satisfactory techniques or methods, to supervise the examination of individuals to scertain their qualifications and competence to conduct such analyses, and to issue permits which shall be subject to termination or revocation at the discretion of the state toxicologist.

(4) When a blood test is administered under the provisions of section 1 of this initiative, the withdrawal of blood for the purpose of determining its alcoholic content may be performed only by a physician, a registered nurse, or a qualified technician. This limitation shall not apply to the taking of breath specimens.

(5) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

(6) Upon the request of the person who shall submit to a chemical test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or his attorney.

NEW SECTION. Sec. 4. The director of the department of motor vehicles shall furnish every applicant for a driver's license or a driver's license renewal with a written summary of the provisions of this initiative.

NEW SECTION. Sec. 5. Section 60, chapter 155, Laws of 1965 extraordinary session and RCW 46.61.505 are each repealed.

NEW SECTION. Sec. 6. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of this act, or the application of the provision to other persons or circumstances is not affected.

Initiative Measure No. 242 filed in the office of the Secretary of State as of February 8, 1968.

Sponsors filed 123,589 supporting signatures as of July 5, 1968.

Canvass of signatures completed as of August 26, 1968 and petitions found sufficient. Measure then certified to the November 5, 1968 state general election ballot for approval or rejection by the voters.

APPENDIX F

RCWA 46.61.503. Driver under twenty-one consuming alcohol - Penalties

(1) Notwithstanding any other provision of this title, a person is guilty of driving or being in physical control of a motor vehicle after consuming alcohol if the person operates or is in physical control of a motor vehicle within this state and the person:

(a) Is under the age of twenty-one;

(b) Has, within two hours after operating or being in physical control of the motor vehicle, an alcohol concentration of at least 0.02 but less than the concentration specified in RCW 46.61.502, as shown by analysis of the person's breath or blood made under RCW 46.61.506.

(2) It is an affirmative defense to a violation of subsection (1) of this section which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of driving or being in physical control and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be in violation of subsection (1) of this section within two hours after driving or being in physical control. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the earlier of: (a) Seven days prior to trial; or (b) the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

(3) Analyses of blood or breath samples obtained more than two hours after the alleged driving or being in physical control may be used as evidence that within two hours

of the alleged driving or being in physical control, a person had an alcohol concentration in violation of subsection (1) of this section.

(4) A violation of this section is a misdemeanor.

APPENDIX G

JUDGMENT & SENTENCE ORDER

Fircrest Municipal Court
115 Ramsdell St
Fircrest, WA 98466
Phone: (253)564-8922, Fax (253)564-3645

DUI ___
__ Passenger under 16
___ 08-.14 ___ .15+
___Refusal ___ No BAC

Defendant: Jensen, Theodore C.				
Case No.	Charge(s)	Amended To	Disp.	Jail Imposed
C-37915	MINOR OP VEH		G	90

Jail Susp.	Jail Credit	Total $ Imposed	$ Suspended	$
90				500.00

☐	Warrant Costs	$100
☒	BAC Assess	$125
☒	Inv Fund	$ 50
☒	TPC	$102.50
☐	TPD	$ 85
☒	DUI Recoup	104.75
☐	_____	

☒ **ALL FINES ARE DUE AND PAYABLE TODAY.**

☐ Community restitution work is granted in lieu of fine.

☒ Defendant shall notify the Court in writing of any change of mailing address.

JAIL STATUS – contact the court clerk within 15 days to set up jail time or alternatives

☐ Jail time shall be served ☐ concurrently, ☐ consecutively, ☐ Alternatives, Work Crew, Day Reporting

*Work-Crew, Day Reporting, Alternatives to jail must be at Court approved facility at defendant's expense

☐ Work-Crew Pierce Co ☐ Day Reporting Pierce Co

☐ Defendant shall serve ___ days of electric home monitoring at defendant's own expense

☐ Credit time served applied to fine/costs $___ for _____

THIS ~~CASE CONTINUED~~ sentence is stayed pending appeal. ☐ with ☐ without stipulation to facts sufficient and ☐ with ☐ without finding until _____

Upon compliance: ☐ Dismissal ☐ Need not appear ☐ Amended to: _____

PROBATION – Defendant shall be on unsupervised probation monitored by the Court for ☒ one year, ☐ five years, ☐ _____

BAIL BOND presently in effect shall be ☐ exonerated, ☐ reinstated, ☐ applied to fine(s), ☐ release $___ retain $___

SENTENCE CONDITIONS

☒ Do not drive without valid driver's license and insurance

☐ No mood altering substances without a prescription

☒ No violations of the law

☐ Have no hostile contact with _____

☐ Comply with attached no contact order

☐ Pay restitution _____

☐ _____

☐ Evidence is ordered ☐ released, ☐ destroyed, ☐ forfeited

YOU MUST BEGIN THE FOLLOWING WITHIN 60 DAYS AND FILE WRITTEN PROOF TO THE COURT WITHIN 90 DAYS

☐ Anger management evaluation and any recommended treatment
Provide monthly reports to the Court

☐ DV Victim Impact Panel

☐ Mental Health Evaluation and any recommended treatment
Provide monthly reports to the Court

☐ _____

Alcohol/Drug Related Additional Conditions:

☒ Alcohol/Drug assessment and any recommended treatment
Provide monthly reports to the Court

☐ Comply with terms and conditions of deferred prosecution

☒ DUI Victim Impact Panel

☐ Attend Alcoholics/ Narcotics Anonymous meetings ___ per week

Provide monthly reports to the Court

☒ Alcohol/Drug Information School (minimum)

☐ Ignition Interlock Device ___ years, calibration level shall be .025%

☐ (a) Defendant shall not drive a motor vehicle without a valid license and proof of insurance. (b) Defendant shall not drive a motor vehicle with an alcohol concentration of .08 or more within two hours after driving. (c) Defendant shall submit to a breath or blood alcohol test upon the reasonable request of a law enforcement officer. (d) Comply with mandatory ignition interlock

device requirements imposed by Department of Licensing. (e) No alcohol related infractions. If you violate (a), (b), or (c), the Court shall order you confined for no less than 30 days and your driving privilege will be suspended for 30 days.

RETURN TO COURT ON _____ at _____ for _____

I understand that if I fail to comply with all conditions of this order or fail to appear for any subsequent court hearing, additional criminal charges may be filed, the court may issue a warrant for my arrest, my driver's license may be suspended, and additional costs and/or jail time may be imposed. Any balance owing may be sent to a collection agency if I fail to pay as scheduled.

/s/ [Illegible]
Defendant Date

/s/ [Illegible] 26274
Defense Attorney Bar #

/s/ [Illegible] 3/2/05
Judge Date

22c

MICRO DATA OLYMPIA (360) 459-3300

CRIMINAL ☒ TRAFFIC ☐ NON-TRAFFIC **CR 0037915**

IN THE ☐ DISTRICT ☒ MUNICIPAL COURT OF FIRCREST , WASHINGTON
☐ STATE OF WASHINGTON , PLAINTIFF VS. NAMED DEFENDANT
☐ COUNTY OF PIERCE
☒ CITY/TOWN OF FIRCREST

FC04-000860

L.E.'s SID #: WA0271700 COURT ORI #: WA027031J

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF WASHINGTON

DRIVER'S LICENSE NO.	STATE	EXPIRES	ID NO. (SSN IF CV)
JENSET C146C8	WA	08	

NAME: LAST JENSEN, FIRST THEODORE, MIDDLE CARL

ADDRESS 4102 RIDGE RD W. ☐ IF NEW ADDRESS

CITY UNIVERSITY PL STATE WA ZIP CODE 98466 EMPLOYER

RACE	SEX	DATE OF BIRTH	HEIGHT	WEIGHT	EYES	HAIR	RESIDENTIAL PHONE NO.
W	M	2-10-86	6-2	210	BLU	BLK	( )

VIOLATION DATE ON OR ABOUT MONTH 10 DAY 23 YEAR 04 TIME 24 HOUR 0129 ☐ INTERPRETER LANG:

AT LOCATION M.P. HOLLY DR @ S ORCHARD ST CITY/COUNTY OF FIRCREST

DID OPERATE THE FOLLOWING VEHICLE/MOTOR VEHICLE ON A PUBLIC HIGHWAY AND

VEHICLE LICENSE NO.	STATE	EXPIRES	VEH. YR.	MAKE	MODEL	STYLE	COLOR
157MYU	WA	1004	97	FORD	EXP	4D	GRY

TRAILER #1 LICENSE NO.	STATE	EXPIRES	TR. YR.	TRAILER #2 LICENSE NO.	STATE	EXPIRES	TR. YR.

OWNER/COMPANY IF OTHER THAN DRIVER ADDRESS CITY STATE ZIP CODE
JENSEN D SAME

ACCIDENT	BAC	COMMERCIAL	HAZARD	EXEMPT
NO INJ P D O	.043 READING .042	☐ YES ☒ NO VEHICLE	☐ YES ☒ NO PLACARD	☐ FARM ☐ FIRE ☐ R.V. ☐ OTHER

DID THEN AND THERE COMMIT EACH OF THE FOLLOWING OFFENSES

1. VIOLATION/STATUTE CODE 46.61.503 ☐ DV

MINOR DUI (.02 +)
(UNDER 21)

2. VIOLATION/STATUTE CODE ☐ DV

RECEIVED
OCT 25 2004
FIRCREST MUNICIPAL COURT

MANDATORY ☒ BAIL U.S. FUNDS $ MAND

APPEARANCE DATE MO. 10 DY. 27 YR. 04 TIME 0830 A.M. P.M. RELATED # DATE ISSUED 10-23-04

WITHOUT ADMITTING HAVING COMMITTED EACH OF THE ABOVE OFFENSE(S), I PROMISE TO RESPOND AS DIRECTED ON THIS NOTICE.

X _____ DEFENDANT'S SIGNATURE

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT I HAVE ISSUED THIS ON THE DATE AND AT THE LOCATION ABOVE, THAT I HAVE PROBABLE CAUSE TO BELIEVE THE ABOVE NAMED PERSON COMMITTED THE ABOVE OFFENSE(S), AND MY REPORT WRITTEN ON THE BACK OF THIS DOCUMENT IS TRUE AND CORRECT.

OFFICER _____ OFFICER _____

CR0037915

COMPLAINT / CITATION

ABSTRACT OF JUDGMENT

CRG	PLEA	CNG	FINDINGS	FINE	SUSPENDED	SUB-TOTAL	FND/JUDG DATE
1	G NG		G NG D BF	$	$	$	ABS. MLD TO OLY
2	G NG		G NG D BF	$	$	$	TO SERVE
					OTHER COSTS $		WITH DAYS SUSP.

RECOMMENDED NONEXTENSION OF SUSPENSION | LICENSE SURRENDER DATE | TOTAL COSTS $ | CREDIT/TIME SVD

WASHINGTON UNIFORM COURT DOCKET - COURT COPY August 1997

BEST AVAILABLE COPY

OFFICER REPORT

533 ENFORCER REPORT

TRAFFIC	WEATHER	STREET	LIGHT
LT MED HV	CL RN FG SN	D W S	D DWN DSK DK

WITNESS NAME (LAST, FIRST, M.I.) PHONE

ADDRESS CITY STATE ZIP

WITNESS NAME (LAST, FIRST, M.I.) PHONE

ADDRESS CITY STATE ZIP

INCIDENT NUMBER	RELATED CITATION/INFRACTION NUMBERS	APPROVING OFFICER/NO.

H2

INFRACTION ☒ TRAFFIC ☐ NON-TRAFFIC IN 0048541

IN THE ☐ DISTRICT ☒ MUNICIPAL COURT OF FIRCREST , WASHINGTON
☐ STATE OF WASHINGTON , PLAINTIFF VS. NAMED DEFENDANT
☐ COUNTY OF PIERCE
☒ CITY/TOWN OF FIRCREST

FI04-00686

L.E.A. ORI #: WA0271700 COURT ORI #: WA027031J

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF WASHINGTON

DRIVERS LICENSE NO.	STATE	EXPIRES	ID NO. (SSN # CV)
JENSETC146CS	WA	08	

NAME: LAST JENSEN, FIRST THEODORE MIDDLE CARL

ADDRESS 4182 RIDGE RD W. ☐ IF NEW ADDRESS ☐ PASSENGER

CITY UNIVERSITY STATE WA ZIP CODE 98466 EMPLOYER

RACE	SEX	DATE OF BIRTH	HEIGHT	WEIGHT	EYES	HAIR	RESIDENTIAL PHONE NO.
W	M	2-10-86	6-2	210	BRO	BLD	(253) 565-9130

VIOLATION DATE ON OR ABOUT: MONTH 10 DAY 25 YEAR 04 TIME 24 HOUR 0129 ☐ INTERPRETER LANG:

AT LOCATION M.P. HOLLY DR @ S. ORCHARD ST CITY/COUNTY OF FIRCREST

DID OPERATE THE FOLLOWING VEHICLE/MOTOR VEHICLE ON A PUBLIC HIGHWAY AND

VEHICLE LICENSE NO.	STATE	EXPIRES	VEH. YR.	MAKE	MODEL	STYLE	COLOR
157MXU	WA	704	97	FORD	EXP	4DR	GRE

TRAILER #1 LICENSE NO.	STATE	EXPIRES	TR. YR.	TRAILER #2 LICENSE NO.	STATE	EXPIRES	TR. YR.

OWNER/COMPANY IF OTHER THAN DRIVER: JENSEN, D. SAME ADDRESS CITY STATE ZIP CODE

ACCIDENT (NO) HR P I F | COMMERCIAL VEHICLE ☐ YES ☒ NO | HAZARD PLACARD ☐ YES ☒ NO | EXEMPT VEHICLE ☐ FARM ☐ FIRE ☐ R.V. ☐ OTHER

DID THEN AND THERE COMMIT EACH OF THE FOLLOWING INFRACTIONS

1. VIOLATION/STATUTE CODE 46.61.400 VEHICLE SPEED 49 IN A ZONE 35 ☐ SCHOOL ☐ PACE ☐ AIRCRAFT

SPEEDING

132.00

2. VIOLATION/STATUTE CODE

3. VIOLATION/STATUTE CODE

PENALTY U.S. FUNDS $ 132.00

RELATED # DATE ISSUED 10-23-04

WITHOUT ADMITTING HAVING COMMITTED EACH OF THE ABOVE OFFENSE(S), I PROMISE TO RESPOND AS DIRECTED ON THIS NOTICE.

X _____ DEFENDANT'S SIGNATURE

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT I HAVE ISSUED THIS ON THE DATE AND AT THE LOCATION ABOVE, THAT I HAVE PROBABLE CAUSE TO BELIEVE THE ABOVE NAMED PERSON COMMITTED THE ABOVE OFFENSE(S), AND MY REPORT WRITTEN ON THE BACK OF THIS DOCUMENT IS TRUE AND CORRECT.

OFFICER 9

OFFICER

ABSTRACT OF JUDGMENT — INFRACTION

INF	RESPONSE	DISPOSITION	PENALTY	SUSPENDED	SUB-TOTAL
1	C NC	C NC D P	$	$	$
2	C NC	C NC D P	$	$	$
3	C NC	C NC D P	$	$	$
					TOTAL COSTS $

FNDG/JDGT DATE

ABSTRACT MLD TO OLYMPIA

IN 0048541

H3

On 10-23, 2004, at 0129 hours, I was operating a speed measuring device, KUSTOM FALCON SN-FF8537 ( ), MPH VINDICATOR SN-VH14719 ( ), MPH Z25 SN-HHS569000092 ( ), MPH PYTHON SN-PYT380000175 ( ), MPH PYTHON SN-PYT546000833 ( ), MPH PYTHON SN-PYT380000176 ( ), MPH PYTHON SN-PYT546000832 (X), MPH PYTHON SN-PT304000829 ( ), MPH PYTHON SN-PYT546004144 ( ) in the moving (X), stationary( ), mode on S. ORCHARD ST within the limits of the City of Fircrest.

(X) 1. Using the tuning fork (s) designated to determine its functionality and accuracy, I tested this radar unit at the beginning of my work shift. Based on the test results, this radar unit tested accurately. The tuning forks I used are assigned to this machine.

(X) 2. Using the internal testing mode designed to determine its functionality and accuracy, I tested this unit at the beginning of my work shift and after the stop. Based on the results, this radar tested accurately.

(X) 3. I checked the digital readout lights. I observed the defendant's vehicle traveling N E S W PASSING( ) ALL ALONE(X) LEADING( ) TRAILING( ) in the INSIDE LANE(X) OUTSIDE LANE( ) SINGLE LANE( )

The radar emitted a clear, high, audible tone. I visually observed the defendant's vehicle traveling faster than the posted 35 MPH limit. The speed which registered on the radar unit indicated the defendant's vehicle speed to be 49 MPH.

The speed was (X) was not ( ) locked on the radar unit.

The defendant did ( ) did not (X) view the radar reading.

The driver did (X) did not ( ) know the speed limit.

The driver did ( ) did not (X) know his/her vehicle speed.

The driver said his/her vehicle speed was 40 MPH.

The vehicle registration/license expired on 10/04. I did (X) did not ( ) confirm this with LESA Records.

( ) The driver could not show proof of Liability Insurance.

TRAFFIC			WEATHER				STREET				LIGHT			
LT	MD	HV	CL	RN	FG	SN	D	W	I	S	D	DWN	DSK	DK

Officer's Comments: DRIVER ARREST – DUI (MINOR)

PHOTO ID: D/L (X) WA ID CARD ( ) MILITARY ( ) OTHER ( ) SEE PHOTO ( )
Subject did ( ) did not ( ) provide Picture ID.

I have attended and successfully completed 8 hours of training in the operation of radar and I am familiar with this unit. My training was through the W.S.C.J.T.C. and I am a certified operator.

I certify under penalty of perjury under the laws of the State of Washington that I have issued NOI#48541 on the date and at the location above, that I have probable cause to believe the above named person committed the above offense (s), and my report written on this document is true and correct.

SIGNATURE /s/ [Illegible] Badge# 9

Date 10-23-04 (Place) Fircrest, Washington

Fircrest Police Arrest Report — Incident No. FC0400686

PDA:		Homeland Security:		Subject:	DUI
IBR Disposition:	Arrest		Case Management Disposition:		
Forensics:			Reporting By/Date:	FC2100 - LaTour, Robert 10/23/2004 1:29:00 AM	
Case Report Status:	In Process		Reviewed By/Date:		

Incident No. FC0400686.1

Related Cases:

Case Report Number	Agency

Non-Electronic Attachments

Attachment Type	Additional Distribution	Count

Location Address:	S Orchard St @ Holly Dr	Location Name:	
City, State, Zip:	Fircrest, WA 98466	Cross Street:	Holly Dr
Contact Location:		City, State, Zip:	
CB/Grid/RD:		District/Sector:	
Occurred From:	10/23/2004 1:29:00 AM Saturday	Occurred To:	
Notes:			

H6

Offense Details: 5404 - Traffic - DUI/Driving Under the Influence - Liquor

Domestic Violence:	No	Child Abuse:		Gang Related:		Juvenile:	
Completed:	Completed			Crime Against:	SO	Hate/Bias:	None (No Bias)
Criminal Activity:						Using:	
Location Type:	Street/Right of Way			Type of Security:		Tools:	
Total No. of Units Entered:				Evidence Collected:			
Entry Method:							
Notes:							

Arrestee A1: Jensen, Theodore Carl

PDA:

Aliases:									
DOB:	2/10/1986	Age:	18	Sex:	Male	Race:	White	Ethnicity:	Non-Hispanic
Height:	5' 2"	Weight:	210	Hair Color:	Blonde/strawberry			Eye Color:	Blue
Address:	4102 Ridge Rd W			County:				Phone:	253 565-9130
City, State Zip:	University Place, WA 98466			Country:				Business Phone:	
Other Address:								Other Phone:	
Resident:	Nonresident			Occupation/Grade:				Employer/School:	
SSN:				DOC No:				FBI No:	
State ID:				Local CH No:					
Driver License No:	JENSETC146CS			Driver License State:	Washington			Driver License Country:	
Hair Length:				Glasses:				Facial Hair:	

Call Source:		Assisted By:	
Phone Report:		Notified:	
Insurance Letter:		Entered By:	FC2100 - LaTour, Robert
Entered On:	10/24/2004 5:09:09 AM	Approved By:	
Approved On:		Exceptional Clearance:	
Adult/ Juvenile Clearance:		Exceptional Clearance Date:	
Additional Distribution:		Other Distribution:	

Validation Processing	Distribution Date:	By:	County Pros. Atty.	Juvenile	Other	CPS	Supervisor
	Indexed Date:	By:	City Pros. Atty.	Military	DSHS	PreTrial	

For Law Enforcement Use Only – No Secondary Dissemination Allowed

Records has the authority to ensure correct agency, CB/Grid/RD, and District/Sector are incorporated in the report.

Printed: October 24, 2004 - 6:47 AM

Printed By: LaTour, Robert

Hair Style:		Teeth:		Facial Shape:	
Hair Type:		Speech:		Complexion:	
Appearance:		Right/ Left Handed:		Facial Feature Oddities:	
SMT:				Distinctive Features:	
Attire:				Body Build:	
Gangs:				Tribe Affiliation:	
Significant Trademarks:				Identifiers:	
Suspect Pretended to Be:			Modus Operandi:		
Place Of Birth:		Habitual Offender:		Custody Status:	
Date/Time Arrested:	10/23/2004 1:41:00 AM	Booked Location:		Date/Time Booked:	
Arrest Location:	Emerson St @ S Orchard St Fircrest, WA 98466	Released Location:	302 Regents Blvd Fircrest, WA 98466	Held For:	
Arrest Offense:	5404 - Traffic - DUI/Driving Under the Influence - Liquor			Date/Time Released:	10/23/2004 2:45:00 AM
Arrest Type:	Summoned/Cited			Juvenile Disposition:	
Armed With:	Unarmed			Adult Present Name:	
Miranda Read:	Yes	Miranda Waived:	Yes	Detention Name:	
No. Warrants:		Multi. Clearance:	Not Applicable	Notified Name:	
Fingerprints:		Photos:		Previous Offender:	
Type of Injury:				Fire Dept Response:	
Hospital Taken To:		Medical Release Obtained:		Taken By:	
Attending Physician:		Hold Placed By:			

New Charges

Arrest #	Book/Cite	Charge Description - RCW/Ordinance	Free Text Charge Description	Court	Bail	Count
CR 037915	Cite	M - - Minor Operate Vehicle After Alcohol Consumption - - 46.61.503		Fircrest Municipal Court	250	1

Warrants

Arrest #	Warrant #	Free Text Charge Description	Agency	Court	Bail

Arrest Notes:	
Probable Cause:	

Other Entity O1: Jensen, Daiel L

PDA:

Aliases:					
DOB:	9/9/1947 Age: 57	Sex: Male	Race: White	Ethnicity:	Non-Hispanic
Height:	Weight:	Hair Color:		Eye Color:	
Address:	4102 Ridge Rd W	County:		Phone:	253 565-9130
City, State Zip:	University Place, WA 98466	Country:		Business Phone:	
Other Address:				Other Phone:	
Resident:	Nonresident	Occupation/Grade:		Employer/School:	
SSN:				Place Of Birth:	
Driver License No:		Driver License State:		Driver License Country:	
Attire:				Complexion:	
SMT:				Facial Hair:	
Entity Type:	Vehicle Registered Owner	Reporting Statement Obtained:		Facial Shape:	
Entity Notes:	Father of arrestee.				

COPY

Property Item No. 1/1: 3501 - Vehicle - Automobile / Car (Not Stolen Or Recovered)

Other Common Item:		Photographed:	
Description:		Fingerprinted:	
Quantity:	1	Contents Sampled:	
Finding Location:		Owner:	01 - Jensen, Dalel L
Status:	I - Information Only	Value:	
Recovered Date:		Make/Brand:	
Recovered Value:		Model:	
Field Tested:		Serial No:	
Field Test Results:		OAN:	
Property Disposition:	Left at Scene	Insurance Company:	
Disposition Location:		Policy No:	

Vehicle Information:

License:	157MXU	Locked:	
License State:	Washington	Keys in Vehicle:	
License Country:	USA	Delinquent Payment:	
Vehicle Year:	1997	Victim Consent:	
Make:	Ford	Driveable:	
Model:	Explorer	Estimated Damage:	
Vehicle Style:	4 Door Automobile, sedan	Damage:	
Primary Vehicle Color:	Dark Green	Damaged Area:	
Secondary Vehicle Color:		Tow Company:	
VIN:	1FMDU34X7VUC82549	Tow Consent:	
Special Features:		Hold Requested By:	

Drug Information:

Drug Type:		Drug Measure:	
Drug Quantity:		Drug Measure Type:	

Jewelry Information:

Metal Color:		Total # of Stones:	
Metal Type:		Inscription:	
Stone Color:		Generally Worn By:	

Firearm Information:

Caliber:		Length:	
Gauge:		Finish:	
Action:		Grips:	
Importer:		Stock:	

Property Notes:

Enter	Date	Time	WACIC	LESA	Initial	Release Info.	Date	Time	Release No.	Release Authority
Clear						Owner Notified			Operators Name	

Investigative Information

Means:		Motive:	
Vehicle Activity:	Moving	Direction Vehicle Traveling:	South

Synopsis:

COPY

Narrative: On October 23, 2004 at about 0129 hours I was traveling northbound on S Orchard St and observed a vehicle southbound on S Orchard St at what I suspected to be at a speed greater than the posted speed limit-

Narrative: On October 23, 2004 at about 0129 hours I was traveling northbound on S Orchard St and observed a vehicle southbound on S Orchard St at what I suspected to be at a speed greater than the posted speed limit – observation based on training and experience. The vehicle had just passed Holly Dr. and I had locked the vehicle speed at 49 mph in a posted 35 mph zone, within the city limits of Fircrest- see infraction IN 48541 for details.

I turned around and followed the vehicle southbound on S Orchard St and initiated a traffic stop on Washington plate 157MXU – registered to O1-Daniel Jensen, at the intersection of Emerson St and S Orchard St. I contacted the driver, A1 – Theodore Jensen and advised him of the reason I stopped him and requested his driver's license.

Theodore said he did not know why I had stopped him and when I told him he said he thought the speed limit was 40 mph. He was very standoffish with me, he did not look at me while I talked to him or when he spoke to me instead he looked down and spoke softly. I could smell the odor of intoxicants emitting from the vehicle and asked Theodore, "How much have you had to drink tonight." He responded, "One beer, at a friends house on Center St." He sat back in his seat while I spoke with him with a lean toward the passenger seat in a manor that I perceived as avoidance of being close to the window where I was standing. I asked Theodore to turn off his vehicle and what until I returned, he did as I asked.

I returned to my patrol car and retrieved a PBT and notified Radio that I would be doing SFST's. I returned to Theodore and asked him if he would be willing to conduct some voluntary field sobriety test? He said, "Sure," and

willingly exited his vehicle. I explained and demonstrated all tests to him prior to him doing them. He said he had no questions and said he could do them as explained and demonstrated. The first test I administered was the HGN, then the Balance test and finally the Walk and Turn – see the Washington State DUI Arrest Report for the details on the field tests.

Based on the Theodore's speeding, the odor of intoxicants emitting from his person and breath that I had detected during the investigation and the field sobriety test I advised him that he was under arrest at 0141 hours. I place Theodore in handcuffs – double locking them and checking them for proper fit and transported him the Fircrest Police Department for the BAC test.

I advised Theodore of his Rights, which he said he understood and did not request an attorney. I then advised him of the Implied Consent Warning which he also said he understood. Theodore willingly answered the questions listed on the DUI packet and at 0215 hour Theodore gave the first of two samples of his breath with .043 results and .042 results for the second at 0218 hours. Theodore's results were printed on Test Document #426992. I gave him his copy of the test document, along with his right to a DOL hearing and waiver of fee request. I punched his driver's license and issued him criminal citation CR 0037915 for Minor-under 21 DUI.

Theodore signed receipt of both citations and promised to appear in court on the assigned date and time on the criminal citation. I told Theodore that I had to contact the owner of the Explorer the let them know of its whereabouts. I asked Theodore if he would like me to call his father, who is also the registered owner and ask him to

pick him up as well. Reluctantly Theodore agreed to have his father pick him up.

At 0245 hours Theodore was released to his father, in-lieu of being booked into jail. Daniel signed the impound waiver and was given the keys to the Explorer. See the Washington State DUI Arrest Report for additional detail on the incident.

Reviewed By: /s/ John Cheesman
Reviewed Date: 10-25-04

[ILLEGIBLE]
[ILLEGIBLE]
[ILLEGIBLE]

WASHINGTON STATE PATROL FCO4-00686
BAC DATAMASTER 949189
SOFTWARE VERSION 76016-004 (07/22/99)

OCTOBER 23, 2004

SIM TEMP 34c +/- .2c: YES

OBSERVATION BEGAN: 01:51

CITATION NUMBER: CR0037915

OPERATOR'S NAME (L/F/M):
LATOUR/R/J

SUBJECT'S NAME (L/F/M):
JENSEN/THEODORE/CARL

SUBJECT'S DOB: 02/10/1986

EXTERNAL STANDARD BATCH #: 04025

H12

– BREATH ANALYSIS –

BLANK TEST	.000	02:14
INTERNAL STANDARD	VERIFIED	02:15
SUBJECT SAMPLE	.043	02:15
BLANK TEST	.000	02:16
EXTERNAL STANDARD	.079	02:17
BLANK TEST	.000	02:17
SUBJECT SAMPLE	.042	02:18
BLANK TEST	.000	02:19

ALL RESULTS IN g/210L

OPERATOR LATOUR

AGENCY FIRCREST

COURT COPY

WASHINGTON STATE

DUI ARREST REPORT

REPORT OF BREATH/BLOOD TEST FOR ALCOHOL OR REFUSAL TO SUBMIT TO BREATH/BLOOD TEST FOR ALCOHOL AND DRUGS

SUBJECT'S NAME (LAST, FIRST, MI)	SEX	DATE OF BIRTH	DATE/TIME OF ARREST
Jensen, Theodore Carl	☒ M ☐ F	02-10-86	10-23-04/014

STREET ADDRESS	CITY/STATE/ZIP CODE
4102 Ridge Rd. West	University, Pl., WA 98466

DRIVER'S LICENSE NUMBER	STATE	COUNTY OF ARREST	CASE/CITATION NUMBER
JENSETC146CS	WA	Pierce	FL04-00686

Type of Test: ☒ Breath ☐ Blood

BAC Readings: 1st Sample .043

2nd Sample .042

Refused Test ___

The subject was lawfully arrested. At that time, there were reasonable grounds to believe that the arrested person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or was under the age of twenty-one years and had been driving or was in actual physical control of a motor vehicle while having an alcohol concentration in violation of RCW 46.61.503.

After receipt of the warnings required by subsection (2) of RCW 46.20.308, a test was administered and the results indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person is age twenty-one or over, or was in violation of RCW 46.61.502, 46.61.503, or 46.61.504 if the person is under the age of twenty-one. OR

After receipt of the warnings required by subsection (2) of RCW 46.20.308, the person refused to submit to a test of his/her blood or breath.

☒ Driver's Hearing Request Information was given to the subject.

☒ Valid Washington driver's license/permit punched.

Notice of Right to Hearing: I have been given written notice of my right to a hearing including the steps required to obtain a hearing, and understand that the notice of suspension, revocation, or denial of license will be mailed to the address furnished on the above portion of this document. I acknowledge that the address indicated is my current address.

/s/ Theo Jensen 10/23/04

SIGNATURE OF DRIVER Date

Complete this box ONLY *if the arrested person was driving a commercial motor vehicle as defined in Chapter 46.25 RCW at the time of the incident.*

☐ Operating a Vehicle Requiring a Commercial Drivers License

BAC Readings 1st Reading ___ 2nd Reading ___
Refused Test ___

There was probable cause to believe that the arrested person was driving or was in actual physical control of a vehicle requiring a commercial driver's license within this state while having alcohol/drugs in his/her system and that a test of his/her breath and/or blood disclosed an alcohol concentration of 0.04 or more. *Chapter 46.25 RCW OR*

There was probable cause to believe that the arrested person was driving or was in actual physical control of a vehicle requiring a commercial driver's license within this state while having alcohol/drugs in his/her system. The arrested person was requested to take a breath/blood test and informed of the consequences of refusal and his/her rights under Chapter 46.25 RCW. The arrested person then refused to submit to the requested test.

VEH YEAR	MAKE	MODEL	LICENSE PLATE NUMBER	STATE	HAZARDOUS MATERIAL? ☐ YES ☐ NO

I certify (or declare) under penalty of perjury under the laws of the state of Washington that the foregoing and the accompanying reports/copies of documents and the information contained therein are true, correct, and accurate (RCW 9A.72.085).

Fircrest	WA0271700	[Illegible]	10-23-04
LAW ENFORCEMENT AGENCY	ORI NO. (9 DIGITS)	OFFICER'S SIGNATURE	DATE SIGNED

302 Regents Blvd	R. Latour	9
MAILING ADDRESS	PRINTED NAME OF OFFICER	BADGE NUMBER

Fircrest	WA	98466
CITY	STATE	ZIP

Fircrest, WA	(253) 565-1198
PLACE SIGNED (city/county/state)	CONTACT PHONE NUMBER FOR HEARING (include area code)

OFFICERS: Fax or mail completed report, breath test document, and supplemental reports to:

Department of Licensing
Driver Responsibility
PO Box 9030 **Number of pages faxed ___**
Olympia, WA 98507-9030
Fax: (360) 570-7026

USE THIS PAGE AS COVER SHEET

☒ **On the date, time and location of this arrest, I had authority to arrest pursuant to my agency's jurisdiction or RCW 10.93**

CONSTITUTIONAL RIGHTS

1. YOU HAVE THE RIGHT TO REMAIN SILENT.
2. YOU HAVE THE RIGHT AT THIS TIME TO AN ATTORNEY.
3. ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.
4. IF YOU ARE UNDER THE AGE OF 18, ANYTHING YOU SAY CAN BE USED AGAINST YOU IN A JUVENILE COURT PROSECUTION FOR A JUVENILE OFFENSE AND CAN ALSO BE USED AGAINST YOU

IN AN ADULT COURT CRIMINAL PROSECUTION IF THE JUVENILE COURT DECIDES THAT YOU ARE TO BE TRIED AS AN ADULT.

5. YOU HAVE THE RIGHT TO TALK TO AN ATTORNEY BEFORE ANSWERING ANY QUESTIONS.
6. YOU HAVE THE RIGHT TO HAVE AN ATTORNEY PRESENT DURING THE QUESTIONING.
7. IF YOU CANNOT AFFORD AN ATTORNEY, ONE WILL BE APPOINTED FOR YOU WITHOUT COST IF YOU SO DESIRE.
8. YOU CAN EXERCISE THESE RIGHTS AT ANY TIME.
9. DO YOU UNDERSTAND THESE RIGHTS?

I HAVE READ OR HAVE HAD READ TO ME THE ABOVE EXPLANATION OF MY CONSTITUTIONAL RIGHTS AND I UNDERSTAND THESE RIGHTS.

SUBJECT'S SIGNATURE /s/ [Illegible]

I UNDERSTAND MY CONSTITUTIONAL RIGHTS. I HAVE DECIDED NOT TO EXERCISE THESE RIGHTS AT THIS TIME. ANY STATEMENTS MADE BY ME ARE MADE FREELY, VOLUNTARILY, AND WITHOUT THREATS OR PROMISES OF ANY KIND.

/s/ [Illegible]	/s/ [Illegible]
OFFICER'S SIGNATURE	SUBJECT'S SIGNATURE

10-23-04 @ 0155	Fircrest WA
DATE/TIME	LOCATION(S)

☐ Constitutional rights (Miranda) were read in the field at ___ hours from the department issued rights card.

ATTORNEY REQUESTED ☐ YES ☑ NO

ATTORNEY CONTACTED? ☐ YES ☐ NO

TIME: ☐ UNABLE

ATTORNEY'S NAME

ATTORNEY'S PHONE NO.

EXPLANATION:

IMPLIED CONSENT WARNING FOR BREATH

WARNING! YOU ARE UNDER ARREST FOR:
(check appropriate box[es])

☐ RCW 46.61.502 OR RCW 46.61.504: Driving or being in actual physical control of a motor vehicle while under the influence of intoxicating liquor and/or drugs.

☒ RCW 46.61.503: Being under 21 years of age and driving or being in actual physical control of a motor vehicle after consuming alcohol.

☐ RCW 46.25.110: Driving a commercial motor vehicle while having alcohol in your system.

FURTHER, YOU ARE NOW BEING ASKED TO SUBMIT TO A TEST OF YOUR BREATH WHICH CONSISTS OF TWO SEPARATE SAMPLES OF YOUR BREATH, TAKEN INDEPENDENTLY, TO DETERMINE ALCOHOL CONCENTRATION. YOU ARE NOW ADVISED THAT YOU HAVE THE RIGHT TO REFUSE THIS BREATH TEST; AND THAT IF YOU REFUSE: (A) YOUR DRIVER'S LICENSE PERMIT, OR PRIVILEGE TO DRIVE WILL BE REVOKED OR DENIED BY THE DEPARTMENT OF LICENSING FOR AT LEAST ONE YEAR; AND (B) YOUR REFUSAL TO SUBMIT TO THIS TEST MAY BE USED IN A CRIMINAL TRIAL.

YOU ARE FURTHER ADVISED THAT IF YOU SUBMIT TO THIS BREATH TEST, AND THE TEST IS ADMINISTERED, YOUR DRIVER'S LICENSE, PERMIT, OR PRIVILEGE TO DRIVE WILL BE SUSPENDED, REVOKED, OR DENIED BY THE DEPARTMENT OF LICENSING FOR AT LEAST NINETY DAYS: (A) IF YOU ARE AGE TWENTY-ONE OR OVER AND THE TEST INDICATES THE ALCOHOL CONCENTRATION OF YOUR BREATH IS 0.08 OR MORE; OR (B) IF YOU ARE UNDER AGE TWENTY-ONE AND THE TEST INDICATES THE ALCOHOL CONCENTRATION OF YOUR BREATH IS 0.02 OR MORE; OR (C) IF YOU ARE UNDER AGE TWENTY-ONE AND YOU ARE IN VIOLATION OF RCW 46.61.502, DRIVING UNDER THE INFLUENCE, OR RCW 46.61.504, PHYSICAL CONTROL OF VEHICLE UNDER THE INFLUENCE.

YOU HAVE THE RIGHT TO ADDITIONAL TESTS ADMINISTERED BY ANY QUALIFIED PERSON OF YOUR OWN CHOOSING.

FOR COMMERCIAL DRIVERS ONLY: IF YOU EITHER (A) REFUSE THIS TEST OR (B) SUBMIT TO THIS TEST AND THE TEST INDICATES AN ALCOHOL CONCENTRATION OF 0.04 OR MORE, YOU WILL BE DISQUALIFIED BY THE DEPARTMENT OF LICENSING FROM DRIVING A COMMERCIAL MOTOR VEHICLE.

I HAVE READ THE ABOVE STATEMENT TO THE SUBJECT

/s/ [Illegible]
OFFICER'S SIGNATURE

I HAVE READ OR HAVE HAD READ TO ME THE ABOVE STATEMENT(S).

/s/ [Illegible]
SUBJECT'S SIGNATURE

10-23-04 0157 Fircrest, WA 98466
DATE/TIME LOCATION

WILL YOU NOW SUBMIT TO A BREATH TEST? [TJ]
☑ YES ☐ NO

Did subject express any confusion regarding the implied consent warnings? **If yes, explain below.**
☐ YES ☑ NO

DO YOU HAVE ANY FOREIGN SUBSTANCE IN YOUR MOUTH? ☑ YES ☐ NO

MOUTH CHECKED? ☑ YES ☐ NO

TIME? 0151

2ND MOUTH CHECK? (If Necessary) TIME? ___
☐ YES ☐ NO

ANY FOREIGN SUBSTANCES FOUND? EXPLAIN:
☑ YES ☐ NO ___ Tongue

REMOVED ☑ YES ☐ NO ___ Ring

PBT READING .045 PBT TIME 0141

H20

☒ I was certified to operate the BAC DATAMASTER / PBT and possessed a valid permit issued by the State Toxicologist for this purpose on the date of this test.

☐ I performed the PBT test in accordance with the State Toxicologist's protocols (Chapter 448-15 WAC)

☒ I observed the subject during the entire observation period.

☒ During that time, the subject did not vomit, eat, drink, smoke, or place any foreign substance in his/her mouth.

☐ BOOKED RELEASED TO:___

☐ PR'D

WASHINGTON STATE

DUI ARREST REPORT
DUI INTERVIEW

CASE / CITATION NUMBER: FC04.006B6

1. DO YOU HAVE ANY PHYSICAL IMPAIRMENTS? EXPLAIN: ☐ YES ☒ NO

2. DO YOU LIMP? ☐ YES ☒ NO

3. ARE YOU SICK / INJURED? EXPLAIN: ☐ YES ☒ NO

4. UNDER CARE OF A DOCTOR OR DENTIST? ☐ YES ☒ NO

5. ARE YOU DIABETIC / EPILEPTIC? ☐ YES ☒ NO

6. DO YOU TAKE INSULIN? ☐ YES ☒ NO

7. HAVE YOU TAKEN ANY MEDICINES/DRUGS IN THE PAST 24 HOURS? ☒ YES ☐ NO

7A. PRESCRIPTION? ☐ YES ☒ NO

7B. NON-PRESCRIPTION? ☒ YES ☐ NO — TYLONOL

7C. LAST DOSE? 10 AM

7D. QUANTITY? 3 PILLS

7E. COCAINE? ☐ YES ☒ NO — MARIJUANA? ☐ YES ☒ NO — OTHER?

8. DO YOU HAVE IMPAIRED VISION? ☒ YES ☐ NO

8A. DO YOU WEAR CORRECTIVE LENSES? ☒ YES ☐ NO

8B. WERE YOU WEARING THEM WHEN YOU WERE STOPPED / BEFORE COLLISION? ☒ YES ☐ NO

9. WHERE DO YOU WORK? DON'T

9A. DID YOU WORK TODAY? N/A

10. TIME YOU GOT OFF WORK? N/A

11. HOURS OF SLEEP LAST NIGHT? 7 HRS

12. WERE YOU DRIVING THE VEHICLE? ☒ YES ☐ NO

13. ANYTHING MECHANICALLY WRONG WITH THE VEHICLE? ☐ YES ☒ NO

14. HAVE YOU BEEN INJURED OR INVOLVED IN ANY COLLISION(S) IN THE PAST 24 HOURS? ☐ YES ☒ NO

15. HAVE YOU HAD ANY ALCOHOL TO DRINK SINCE BEING STOPPED / THE COLLISION? ☐ YES ☒ NO

15A. WHAT? N/A

15B. HOW MUCH? N/A

16. TIME COLLISION OCCURRED? N/A

17. WHERE WERE YOU GOING BEFORE STOPPED / THE COLLISION? HOME

18. WITHOUT LOOKING, WHAT TIME DO YOU THINK IT IS? 11:30 PM

(ACTUAL TIME) 0203

19. WHAT STREET / HIGHWAY WERE YOU ON? S ORCHARD ST

20. DIRECTION OF TRAVEL? EAST

21. STARTED FROM? CENTER ST.

22. TIME STARTED? 11 O'CLOCK

23. DAY OF THE WEEK? ☐ Mon ☐ Tues ☐ Wed ☐ Thurs ☒ Fri ☐ Sat ☐ Sun

24. WHAT CITY / COUNTY ARE YOU IN NOW? PIERCE

25. WHAT IS THE DATE? 2-20-Z3

26. HAVE YOU BEEN DRINKING ALCOHOLIC BEVERAGES? ☒ YES ☐ NO

26A. WHAT HAVE YOU BEEN DRINKING? BEER

26B. HOW MUCH? 1 - 22 oz MALT

26C. WHEN DID YOU START? 1 HR BEFORE S

27. WHO HAVE YOU BEEN DRINKING WITH? FRIENDS

28. WHERE WERE YOU DRINKING? FRIENDS

29. TIME OF LAST DRINK? 10 O'CLOCK

30. DO YOU BELIEVE YOUR ABILITY TO DRIVE WAS AFFECTED BY YOUR ALCOHOL AND/OR DRUG USAGE? NO

If drug use indicated, please contact WSP Communications or local DRE after breath test and continue with DUI process.

PRE-ARREST OBSERVATIONS

1. ATTITUDE	2. COORDINATION	3. CLOTHES	4. EYES	5. FACIAL COLOR	6. ODOR OF INTOXICANTS ON BREATH	7. SPEECH
☒ COOPERATIVE	☐ GOOD	☒ ORDERLY	☒ NORMAL	☐ NORMAL	☐ NONE	☐ GOOD
☐ MOOD SWINGS	☒ FAIR	☐ SOILED – EXPLAIN	☒ WATERY	☒ FLUSHED	☐ FAINT	☒ FAIR
☐ ARGUMENTATIVE	☐ POOR	☐ OTHER: EXPLAIN	☒ DROOPY	☐ PALE	☒ MEDIUM	☐ REPETITIVE
☐ CRYING	☐ FUMBLED FOR DRIVER'S LICENSE	☐ SHOES (Describe)	☐ BLOODSHOT	☐ OTHER:	☐ STRONG	☐ FAST
☐ LAUGHING	☐ OTHER:		☐ PUPILS DILATED		☐ OBVIOUS	☐ SLURRED
☐ OTHER:			☐ PUPILS CONSTRICTED		☐ OTHER:	☐ OTHER:
			☐ OTHER:			

8. OFFICER'S OPINION (of subject's impairment due to use of alcohol/drugs) ☒ SLIGHT ☐ OBVIOUS ☐ EXTREME

9. SUBJECT'S NATIVE LANGUAGE ☒ ENGLISH ☐ OTHER____

9A. SUBJECT APPEARED TO UNDERSTAND INSTRUCTIONS ☒ YES ☐ NO

9B. INTERPRETER REQUESTED? ☐ YES ☒ NO TIME:____ EXPLAIN BELOW:

INTERPRETER PROVIDED —

10. PASSENGER(S) INFORMATION

NONE

000021

H21

WASHINGTON STATE

DUI ARREST REPORT
SOBRIETY TESTS

CASE/CITATION NUMBER: FC54.006886

SURFACE: ☒ PAVED ☐ GRAVEL ☐ DIRT ☐ GRASS ☐ OTHER

GRADE: ☐ LEVEL ☐ SLIGHT GRADE ☒ MODERATE GRADE ☐ OTHER

LIGHTING: ☐ DAYLIGHT ☐ DARK ☒ STREET LIGHT ☐ OTHER

1. HORIZONTAL GAZE NYSTAGMUS (HGN)

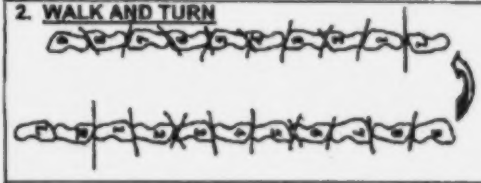
☒ I have been trained in the administration of HGN testing and performed the test in accordance with this training.

			L	R	
EQUAL TRACKING	☐ YES	☒ NO	☒	☒	Lack of smooth pursuit
EQUAL PUPILS	☒ YES	☐ NO	☒	☒	Distinct and continuous nystagmus at max deviation
RESTING NYSTAGMUS	☐ YES	☒ NO	☐	☐	Angle of onset prior to 45 degrees

VERTICAL NYSTAGMUS ☐ YES ☒ NO

COMMENTS: JENSEN HAD NARROW EYES, COMBINED W/ THE EFFECTS OF THE ALCOHOL (DRUGS) IT WAS DIFFICULT TO CONFIRM AN ANGLE OF ONSET PRIOR TO OR AT 45°

2. WALK AND TURN



☐ Cannot keep balance ☒ Starts too soon

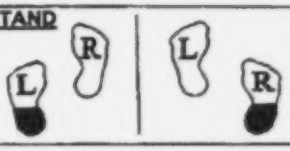
	1st Nine Steps	2nd Nine Steps
Stops Walking		
Miss Heel – Toe	6 x's	5 x's
Steps off line		
Raises arms	X	X
Actual # steps	9	9

DESCRIBE TURN: JENSEN PLANTED HIS LEAD FOOT & SPUN AROUND W/O STEPPING AROUND AS EXPLAINED.

CANNOT DO TEST (EXPLAIN)

COMMENTS: JENSEN D.D NOT TOUCH HEEL TO TOE ONE TIME DURING THE ENTIRE TEST FOR EVER / HE MISSED HEEL TO TOE AND FOR EVER X HE STEPPED ON HIS TOE. HE USED HIS ARMS TO KEEP HIS BALANCE AND D.D START AFTER BEING TOLD NOT TOO.

3. ONE LEG STAND



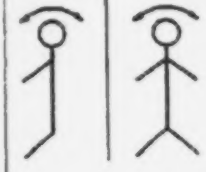
L	R	
		Sways while balancing
		Uses arms for balance
		Hopping
		Puts foot down

COMMENTS: D.D NOT DO - ~~DUE~~ BECAUSE OF ANGLE OF HILL.

SUPPLEMENTAL TESTS

ABC'S: A B C D E F G H I J K L M N O P Q R S T U V W X Y Z

BALANCE



NOTES: SLIGHT WAVING BACK AND FORTH AND IN A CIRCLE MOTION.

FINGER DEXTERITY

NOTES

FINGER TO NOSE

☐ right ☐ left

000122

H22

H23

WASHINGTON STATE
DUI ARREST REPORT
NARRATIVE

CASE / CITATION NUMBER
FC04-00686

Vehicle in Motion (Initial Observation, Observation of Stop):

SEE ENFORCER REPORT FOR DETAILS

Personal Contact (Observation of driver, statements, pre-exit, sobriety tests, observation of the exit, odors, general observations such as speech, attitude, clothing, etc.)

Pre-Arrest Screening (Field Sobriety Tests):

Administrative Process (BAC and Disposition):

I certify (declare) under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. (RCW 9A.72.085.)

/s/ [Illegible]	9	R.Latour	9
OFFICER'S SIGNATURE	BADGE NUMBER	PRINTED NAME OF OFFICER	BADGE NUMBER

AGENCY Fircrest P.D.

PLACE SIGNED (city/county/state) Fircrest, Pierce

DATE SIGNED 10/23/04

Take special note that the "Special Evidence Warning" as well as the "implied consent for blood and voluntary

blood/urine/breath" will no longer be part of this packet and are available as a stand-alone form. These forms will be available through your agency or the Washington State Patrol.

FC04-00686

CITY OF FIRCREST

VEHICLE IMPOUND WAIVER

Year 97 Make FORD Body Type SUV/1FMDU34X7VUC825

Lic. # 157MXU State WA. Time Left 0147

Color GREEN Date Left 0147 HRS 10/23/04

Location of Vehicle EMERSON / ORCHARD ST

Reason DRIVER ARRESTED – DUI

Name of Driver JENSEN, THEODORE C.

HOLD HARMLESS AGREEMENT

In consideration of being allowed to exercise the option of waiving impound of the above described vehicle, I hereby relieve and release the City of Fircrest, its officers and employees from any and all responsibility for the described vehicle and its contents and from any damage or liability which might arise as a result of the use of said vehicle by the party to whom I have released it, or from any claim of damage or loss which might arise as a result of leaving the said vehicle parked at the above location at my direction. I further agree to hold harmless the City of Fircrest, its officers and employees from any and all claims which might arise as a result of my election to waive impound of the described vehicle.

Undersigned agrees to remove the vehicle within 24 hours after which this agreement is void. The automobile will then

be removed by police authority and in all cases the cost of removal will be assumed by the signator.

Signature [Illegible] 9-9-4
Officer [Illegible] No.___

THIRD PARTY RELEASE

In lieu of impoundment it is requested that my vehicle, license # _____ be released to _____

This alternative absolves the City of Fircrest or its agents, of all responsibility for the vehicle or its contents.

Signature _____
Officer _____No.___

APPENDIX I

IN THE FIRCREST MUNICIPAL COURT
IN AND FOR THE STATE OF WASHINGTON

CITY OF FIRCREST, Plaintiff, vs. THEO JENSEN, Defendant.	NO: C37915 STATEMENT OF DEFENDANT ON SUBMITTAL OR STIPULATION TO FACTS

I am the defendant in this case. I wish to submit the case on the record. I understand that this means that the judge will read the police report and other materials and, based upon that evidence, the judge will decide if I am guilty of the crime of Driver Under Twenty One Consuming Alcohol.

I understand that, by this process, I am giving up the constitutional right to a jury trial, the right to hear and question witnesses, the right to call witnesses in my own behalf, and the right to testify or not testify.

I understand that the maximum sentence for this crime is 90 days in jail and a $1000.00 fine and that the judge can impose any sentence up to the maximum, no matter what the prosecution or the defense recommends.

No one has made any threats or promises to get me to submit this case other than the prosecuting authority's promise to take the following action and/or make the following recommendations:

To agree to a stay of sentence pending appeal; and in the event an appeal is unsuccessful, to recommend suspension of all jail time, a $500.00 fine, a $125.00 BAC fee,

a $50.00 investigation fund fee, a $102.50 criminal traffic assessment, a law enforcement recoupment of $104.75, and probation with the conditions that I not drive without a valid license and insurance, that I have no criminal law violations and that I obtain an alcohol evaluation and follow up with recommended treatment, to include at minimum, Alcohol and Drug Information School and a Victim's Impact Panel.

DATED this 2nd day of March, 2005.

/s/ Theo Jensen
Defendant

/s/ Michael B. Smith
Michael B. Smith,
WSBA # 134747
Prosecuting Attorney

/s/ Linda Callahan
Linda M. Callahan,
WSBA #26274
Attorney for Defendant

APPENDIX J

[Seal]

State of Washington

WASHINGTON STATE PATROL
FORENSIC LABORATORY SERVICES BUREAU
2203 Airport Way South, Suite 360•Seattle, Washington
98134-2027•(206) 262-6000•FAX (206) 262-6018

STATEMENT OF STATE TOXICOLOGIST

In my role as the State Toxicologist and by my authority outlined in RCW 46.61.506, I have reviewed and approve the contents of this manual, the Breath Test Program Policy and Procedure Manual, containing forms for the implementation and maintenance of the breath alcohol testing program throughout the State of Washington. The contents of this manual become effective on November 4, 2005.

/s/ [Illegible]
Barry K. Logan, Ph.D.
State Toxicologist

11/4/05
Date

WASHINGTON STATE PATROL
BREATH TEST PROGRAM

BREATH TEST PROGRAM POLICY AND PROCEDURE MANUAL

PURPOSE STATEMENT

This notebook should contain the most recent written policies and procedures followed by personnel within the Breath Testing Program. Generally, these policies and procedures exceed the requirements of the Washington

Administrative Code and reflect an attempt to ensure the highest possible confidence in the Breath Testing Program. All references made throughout this manual to the "DataMaster" shall include both the BAC DataMaster and the BAC DataMaster CDM.

These forms have been developed primarily by personnel within the Breath Test Program, however the manual in its entirety has been approved by the State Toxicologist. Some forms reflect the language of appropriate court rules. All forms are subject to revision when appropriate to improve the overall program. When a significant revision is necessary, a Policy/Form Revision Directive will be issued along with the revisions to Breath Test Program personnel for updating the manual.

All records generated as a result of repairs, maintenance, or Quality Assurance of DataMaster instruments used for evidential purposes shall be maintained according to the protocols described in this manual. Program personnel are to follow all policies and procedures whenever reasonably possible. Deviation may be justified where in the professional judgment of the technician, the supervising technician, or the state toxicologist, the scientific integrity of the procedure, the instrument, the program or any breath alcohol measurement is not compromised. These protocols are intended to provide program guidance and uniformity while still allowing for professional judgment.

* * *

WASHINGTON STATE PATROL
BREATH TEST PROGRAM

DATAMASTER CALIBRATION PROCEDURE

I. Preliminary Guidelines:

A. "Calibration" is the process of standardizing the DataMaster instrument to a known ethanol vapor concentration using a certified simulator solution. This allows for the quantitative measurement of the ethanol concentration in a person's breath.

B. Use a certified ethanol solution from the State Toxicology Laboratory.

C. Use only Guth Model 34C or 2100 simulators. For the ethanol solution, use a simulator with a thermometer that has been certified according to the Simulator Thermometer Certification Policy and Protocol.

D. When using a given solution during calibration, the simulator inlet port should be attached to the pump via the "Calibrate" port on the instrument and the simulator outlet port to the breath tube.

II. Procedure:

A. Set the "ETHANOL CONCENTRATION" in the supervisory options to the vapor concentration of the gas chromatograph reference value of the certified solution. Round the four digit State Toxicology Laboratory value to three digits.

B. Ensure that the ethanol simulator thermometer indicates 34° ± 0.2° C. The water simulator may contain tap water and only

needs to be heated – not at a specific indicated temperature.

C. Use the Fl-F2 keys on the keyboard to initiate the calibration procedure.

D. Follow the displayed instructions.

1. When the display reads "BLOW WATER VAPOR", introduce water vapor into the breath tube using a heated simulator. Push NOVOL (NV) if necessary to accept the sample.

2. When the display reads "BLOW ETHANOL", introduce the known ethanol solution vapor into the breath tube until a stable reading is obtained. Push NOVOL (NV) to accent the sample if necessary.

E. Printout and examine the CAL factors and retain the breath test document.

F. Record the solution batch number used on the Quality Assurance Procedure report form (481.BTS).

G. The technician shall be allowed to perform the calibration procedure as often as they determine to be necessary in order to achieve optimum instrument performance. Only the final breath test document needs to be retained.

WASHINGTON STATE PATROL
BREATH TEST PROGRAM

DATAMASTER OUALITY ASSURANCE PROCEDURE

The Quality Assurance Procedure ensures the accuracy, precision and forensic acceptability of the DataMaster instrument for the purpose of quantitatively measuring the alcohol concentration of a person's breath. The Procedure evaluates critical systems within the instrument to ensure their compliance with strict pre-determine criteria. When complying with the standards required in the Quality Assurance Procedure, the DataMaster can be confidently placed in the field for evidential use.

The protocol described below is to be followed when performing the Quality Assurance Procedure on DataMaster instruments. This procedure is to be completed in the following circumstances:

1. *Prior to an instrument being installed in the field for evidentiary use.*
2. *After replacing any of the following components and prior to being placed back into the field for evidentiary use:*
    a. *Central Processing Unit (CPU) Board*
    b. *Infrared Detector*
    c. *Infrared Detector Block*
    d. *Infrared Detector Board*
    e. *Software*
3. *After disassembly and then reassembly of sample chamber.*
4. *If instrument requires recalibration for any reason.*
5. *At least once every year.*

I. Procedure: The following is to be performed or personally observed by each individual testing the instrument.

A. Electrical Checks

1. Sample Chamber Control Board

I. Version #101226

a. Flow Detector
–Place black voltmeter lead on TP5
–Place red voltmeter lead on bottom of R28
–Adjust R26 to 0.200 (±0.005) VDC
–Move red lead to TP2
–Adjust R29 to 1.40 (±0.10) VDC
–Move red lead back to bottom of R28
–Adjust R26 to 0.020 (±0.010) VDC
(This should be double checked when instrument fully warm)

b. Sample Threshold

–Leave black voltmeter lead on TP5
–Place red voltmeter lead on TP 1
–Adjust R34 to 2.40 (±0.10) VDC

II. Sample Control Board (Version #41625)

a. Breath Volume Circuit

–Place black voltmeter lead on TP5
–Place red voltmeter lead on TP8
–Adjust R26 to 0.200 (±0.005) VDC
–Move red lead to TP2
–Adjust R29 for 1.40 a 0.10) VDC
–Move red lead back to TP8
–Adjust R26 to 0.020 (±0.010) VDC
(This should be double checked when instrument fully warm)

2. Detector Board: (Test Point 4 ground)

   a. Infrared Detector Cooler:

      1) Test Point 1: Adjust R4 to voltage indicated on tag attached to cable coming from J37 on Detector Board (±.01) VDC.

      2) If the tag listing the cooler voltage is not present, or of [sic] the detector is replaced perform the following: Turn the instrument off and let it cool down to room temperature (approximately 30 minutes). Turn the instrument on and place voltmeter across R26 on Detector Board. Adjust R4 for .475 (±.010) VDC. Recheck voltage at Test Point 1. and notate this voltage as the new Detector Cooler voltage.

   b. Detector Bias.

      1) Top of R45 or TP13 depending on board version: 120.0 (±0.5) VDC: Adjust R1

3. Sample Chamber Control Board:

   a. IR Source Intensity

      1) Activate MTR on keyboard so the Detector voltage is displayed. Adjust R16 on the Sample Control Board for a displayed detector voltage of 0.000 (±.100) VDC.

4. CPU Board: (Test point 0, or lower left corner pad is ground)

a. Analog-to-Digital Converter Reference

1) Versions with Test Point 2 and R37 present: Test Point 2 or U29 pin 2: 2.00 (±.01) VDC: Adjust R37

2) No adjustment performed on Versions without Test Point 2 and R37

5. Radio Frequency Interference (RFI) threshold: (Top of R8 ground)

a. Antenna must be installed.

b. Activate MTR on keyboard

c. Left side of L2. If reading is 4-6 VDC, adjust R18 clockwise (CW) to read 0-1 VDC. If reading is at 0-1 VDC, adjust R18 counter clockwise (CCW) to read 4-6 VDC. When R18 turning point is reached, turn R18 ½ to 1 turn clockwise. When the voltage is between 4-6 VDC the MTR should display "RADIO INTERFERENCE".

B. Calibrate the instrument according to DataMaster Calibration Procedure. Record the batch number of the solution used on the Quality Assurance form 481.BTS.

C. Perform steps D-L below for each of the four solution levels (0.04, 0.08, 0.10, 0.15).

D. Use only Guth Model 34C or 2100 simulators which contain a certified ethanol solution prepared and tested by the State Toxicology Laboratory.

E. Set the supervisory test option for ten tests.

F. Set keyboard and data collection to "OFF".

G. Simulator check to "OFF".

H. Sample Check to "OFF".

I. Verify that the simulators used have thermometers which have been certified according to the Simulator Thermometer Certification Policy and Protocol. Verify that the thermometer indicates that the temperature of the simulator solution is 34° ± 0.2° C.

J. Insert the document (except on DataMaster CDM) and push "SUP".

K. When the ten tests are completed verify the simulator thermometer indicates the temperature of the solution is 34°± 0.2° C, initial and retain the breath test document.

L. Calculate the mean and standard deviation of the ten measurements using the three-digit value printed for each test. The mean and standard deviation should both be rounded to and reported to four decimal places.

1. Determine if results meet test for accuracy using the formula:

$$\frac{\text{Mean - Reference Value}}{\text{Reference Value}} \times 100 = \text{within } \pm 5.00\% \text{ inclusive.}$$

a. The Reference Value is to be determined by dividing the four digit mean value received from the State Toxicology Laboratory by 1.23.

b. The Reference Value is to be rounded to four digits.

2. Determine if results meet test for precision (coefficient of variation) using the formula:

$$\frac{\text{Standard Deviation}}{\text{mean}} \times 100 \leq 3.00\%.$$

3. The Accuracy% and CV% should both be rounded and reported to two decimal places.

M. Complete Breath Test

Set supervisory test to One. Set keyboard, Simulator Check, and Sample Check to "ON". Conduct a complete breath test on the instrument using a live subject's breath sample. Use a simulator containing approximately 0.080g/210L solution. Retain the Breath Test Document.

N. Interferant Detector Test

1. Use a simulator containing approximately 0.08 g/210L of ethanol to which approximately 0.5 ml of acetone has been added.

2. Verify the simulator thermometer indicates the temperature is 34° ± 0.2° C and conduct one supervisory test.

3. Verify that the instrument displays "INTERFERENCE DETECTED".

4. Push the ABT key and then push the copy key and retain printout copy.

O. Filter Error

1. Using the SUP mode, prevent the Acetone filter from going into place. The instrument should stop the test and display "FILTER ERROR" on the display.

2. Push the ABT key and then push the copy key and retain printout copy.

P. Mouth Alcohol Test

1. Set instrument up to perform a breath test (with keyboard off).

2. A human subject is to exhale into instrument during the "PLEASE BLOW" phase shortly after introducing into the mouth a substance containing ethyl alcohol.

3. Verify that instrument displays "INVALID SAMPLE".

4. Push the ABT key and then push the copy key and retain printout copy.

Q. Radio Frequency Interference (RFI) Detector Test.

1. Set the instrument up to display "PLEASE BLOW".

2. Transmit a hand held (portable) police radio in the proximity of the instrument.

3. Verify that instrument displays "RADIO INTERFERENCE".

4. Push the ABT key and then push the copy key and retain printout copy.

R. Perform a Diagnostic Test and retain the breath test document.

S. Quality Assurance form 481.BTS shall be completed and signed when steps A-R have been successfully performed as described. The original completed form will be sent to the Seattle office and a copy retained locally.

T. The entire Quality Assurance Procedure shall be repeated if one of the following conditions exist during the Quality Assurance procedure:

1. Readjustment of voltages that are outside of tolerances is necessary prior to completing the Quality Assurance Procedure.

2. Any replacement of parts or components is necessary prior to completing the Quality Assurance Procedure.

II. Prior to re-installing the instrument in the field, complete the following:

A. Employ the RESET OPTIONS function with the F1/F2 keys

B. Ensure the simulator standard is set to 0.080 ± 0.008

C. Ensure the INTERFERENCE level is set to 0.010

Statement of State Toxicologist

In my role as the State Toxicologist and by my authority outlined in RCW 46.61.506, I recognize the above quality assurance procedure to be proper for periodic confirmation of the accuracy, precision and proper working order of DataMaster instruments. Further, I direct DataMaster Technicians to follow these procedures.

/s/ [Illegible]
Barry K. Logan, Ph.D.
State Toxicologist

11/4/05
Date

Office use only

WASHINGTON STATE PATROL
BREATH TEST PROGRAM
DATAMASTER QUALITY ASSURANCE
PROCEDURE

Instrument Serial Number #_____ **Date**_____

Electrical Checks:
Within tolerance

1.a) __

1.b) __

2.a) __

2.b) __

3. __

4. __

5. __

Simulator Ethanol Tests
(Guth Model 34C or 2100)

	Conc.	0.04	0.08	0.10	0.15
	St. Ref. Value	___	___	___	___
	Solution Batch #	___	___	___	___
	Simulator #	___	___	___	___
	Simulator Thermometer #	___	___	___	___
	Calibration **Water**	___	___	___	___
	Simulator #__				
	Simulator Thermometer #__	___	___	___	___
	Ethanol Batch #__	___	___	___	___
	Simulator #__				
	Simulator Thermometer #__	___	___	___	___
____	**Sim. Temp:34 (+/-.2)c**	___	___	___	___
____	**Accurate (+/-5.00%)**	___	___	___	___
____	**Precise (+/-3.00%)**	___	___	___	___
____	**Complete Breath Test**	___	___	___	___
____	**Interference Test**	___	___	___	___

Acetone Ethanol Batch #___ ___ ___ ___ ___
Simulator #___
Simulator Thermometer #___ Mean ___ ___ ___ ___

___ **Filter Error** SD ___ ___ ___ ___

___ **Mouth Alcohol Test** Accuracy % ___ ___ ___ ___

___ **RFI Test** CV% ___ ___ ___ ___

___ **Diagnostic Test**

A check mark indicates successful completion of the test, or compliance with DataMaster Quality Assurance Protocol. I swear under penalty of perjury that in regards to the above listed Instrument, I have complied with the DataMaster Quality Assurance Procedure approved by the Washington State Toxicologist.

_____ _____

_____ _____

WASHINGTON STATE PATROL
BREATH TEST PROGRAM

SIMULATOR SOLUTION CHANGING PROCEDURE

The following procedure shall apply to the DataMaster when changing simulator solutions or installing new instruments. The simulator solution is known as the External Standard.

RESPONSIBILITIES:

1. Only trained personnel shall change simulator solutions.
2. Trained personnel shall be responsible for monitoring and changing simulator solutions.
3. Solution measurements can be monitored through the host computer or by completing a supervisor test.
4. Ensure that only Guth Model 34C or 2100 simulators are employed for field use.

SOLUTION SUPPLY:

1. Simulator solutions for field use are to be prepared only by the State Toxicology Laboratory.
2. Only solutions within a sealed container labeled with the batch number are to be used.

WHEN TO CHANGE SOLUTIONS:

1. Solutions shall be changed at least every 60 days regardless of number of tests or measurement value.
2. The simulator solution shall have an expiration date of one calendar year following the date of its preparation.

3. When the instrument is removed from the facility for Quality Assurance, for repair or for any other reason and then re-installed.

SIMULATOR SOLUTION CHANGE PROTOCOL

1. Turn off and disconnect simulator.
2. Discard old solution.
3. Dry the simulator tubing by removing excess moisture, replace tubing if necessary.
4. Check the instrument simulator ports for obvious excess moisture and dry if necessary.
5. The outlet tubing from the simulator should be kept as short as possible.
6. Ensure simulator elements and jar are clean and dry, pour contents of container into jar, tighten jar to simulator, and ensure the appropriate batch # label is attached.
7. Re-attach simulator and turn on.
8. Ensure that the thermometer indicates the correct temperature of: 34° C ± 0.2° C
   a. Adjust potentiometer if necessary.
   b. Ensure that the power and heater lamps are working properly.
9. Run one complete breath test entering data according to the steps outlined in Data Entry for Breath Test Program Personnel and using a live subject's breath sample.
10. Keep the evidence document of the completed test. Complete the form entitled "Simulator Solution Replacement Record" (482.BTS) recording the results to

three digits. The expiration date is one calendar year following the date appearing on the solution container.

SIMULATOR SOLUTION CHANGE PROCEDURE CONT.

ADDITIONAL:

1. Ensure that the instrument has adequate supplies: mouthpieces, evidence documents, DUI arrest forms, code book.
2. Ensure breath tube is warm.
3. Check date and time and adjust if necessary.
4. Check RFI antenna and phone connections.
5. Replace "Drinking Location Codes" in code book with updates from the Liquor Control Board.

Statement of State Toxicologist

In my role as the State Toxicologist and by my authority outlined in RCW 46.61.506, I recognize the above simulator solution changing procedure to be proper for changing the simulator solution on DataMaster instruments. Further, I direct certified solution changers to follow these procedures.

/s/ [Illegible]
Barry K. Logan, Ph.D.
State Toxicologist

11/4/05
Date

* * *

APPENDIX K

PROCEDURE FOR THE PREPARATION OF 0.08 SIMULATOR EXTERNAL STANDARD SOLUTION FOR USE WITH A BREATH TEST INSTRUMENT

Introduction:

The BAC Datamaster breath test instrument is equipped with a Guth Breath Alcohol Simulator. This device produces a predictable, known vapor concentration by passing air though a heated aqueous solution of known alcohol concentration.

Principle and Purpose

The simulator external standard solution is a water and ethanol mixture formulated to provide a standard ethanol vapor concentration when used in a breath alcohol simulator at 34 ± 0.2 degrees Centigrade, of between 0.072 and 0.088 grams of ethanol per 210 liters of air, inclusive. To allow for depletion of alcohol from the solution during its use, the target starting concentration is 0.082 g/210L.

The aqueous ethanol concentration is determined as follows. The water/air partition ratio at 34 degrees Centigrade is 2585.8 (Jones, 1983). The water/alcohol concentration required to produce a 0.082 g/210L of vapor equivalent, should be 0.101 g/100 mL. For convenience, the simulator solution batches are prepared in a 52L container, requiring 52.5 grams of ethanol. The density of absolute ethanol at room temperature is 0.79 g/mL, therefore a volume of 66.5 mL of ethanol in 52L of water is required.

The preparation is carried out at room temperature.

The reference vapor concentration used is the average value of the solution concentration (rounded to four decimal places) divided by 1.23 (Jones 1983, Dubowski 1983) and rounded to four decimal places to give the alcohol concentration in grams per 210 liters of vapor.

Equipment:

Agilent (Hewlett Packard) Headspace Autosampler or equivalent
Agilent (Hewlett Packard) 6890 or 6890N gas chromatograph; one equipped with a J&W DBALC1 megabore (0.53 mm) 30 meter capillary column and/or J&W DBALC2 megabore (0.53 mm) 30 meter capillary column or equivalent. (For information on the columns, see Headspace Protocol)
Computer System equipped with HP GC Chem Station
Compressed gases; air, nitrogen, hydrogen, helium
Autosampler vials
Cap crimpier
Hamilton Automatic Diluter
50mL volumetric flask, grade A
10mL, 5mL, 2mL, 1 mL volumetric pipette, grade A
1mL pipette
Mechanical mixer and stir rod
Calibrated 52L container

Approved: Date:

/s/ [Illegible] 12/1/05

Glass or appropriate plastic 500mL containers and caps
Tamper evident Tape or tamper evident caps
Plastic storage bottles

Reagents:

200 proof absolute ethanol (USP Grade) (used within 6 months of the date first opened)
Laboratory Grade water

Controls:

Commercially prepared controls are included in run.

Preparation:

1) Fill the 52L vessel to approximately 80% of the 52L mark with deionized water.

2) In a 1L flask, add approximately 900mL deionized water and using volumetric glassware, add precisely 66.5 mL absolute ethanol into the flask. Stopper the flask and mix well by inverting several times and add the contents of the flask to the mixing vessel. Rinse the flask with approximately 1L deionized water and add this to the mixing vessel. Fill the mixing vessel to the 52L mark with deionized water. Mix the solution by applying mechanical mixing for a minimum of two hours.

3) Assign a batch number to the solution. The first two digits of the batch number represent the year in which the solution was made, followed by a sequential three digit number, beginning with 001. Therefore, the first batch of 2006 would be 06001.

4) Remove approximately 50 mL of the mixed solution for testing.

Certification:

1) An individual with a valid Blood Analyst Permit, authorized by the State Toxicologist, analyzes five separate aliquots of the simulator solution, by headspace gas chromatography.

2) Record the results of the testing in the solution certification database, including the date and the results of the contemporary external control. Enter the control lot number.

3) A minimum of three (3) analysts must certify the solution prior to its certification.

4) The average of the results from all of the analysts are computed (rounded to four decimal places). The standard deviation and relative standard deviation (CV) on all results are computed. (Freedman et al., 1978).

5) The solution is acceptable for use and therefore certified if it meets the following criteria:

   a. The average solution concentration is between 0.098 and 0.108g/100mL inclusive.

   b. The CV is 5% or less.

Approved: Date:

/s/ [Illegible] 12/1/05

Barry K. Logan, PhD 2 of 5 Revised 12-05

6) The reference vapor concentration is calculated by dividing the solution concentration by 1.23 and rounding to four decimal places.

7) A solution is valid for use for a period of one year from the date of preparation.

Packaging:

1) The solution is dispensed into 500mL glass or appropriate plastic bottles and capped, tightly.

2) Each bottle is labeled with the batch number and its expiration date.

3) The bottles are sealed with tamper evident tape. Alternatively, tamper evident caps may be used in lieu of regular caps with tamper evident tape.

4) Once the solution is certified, it may be provided to the BAC technicians for use with the breath test instruments.

References:

A.W. Jones, Determination of Liquid/Air Partition Coefficients for Dilute Solutions of Ethanol in Water, Whole Blood and Plasma. Journal of Analytical Toxicology, 7, 1983 pp 193-197.

K.M. Dubowski, Breath Alcohol Simulators: Scientific Basis and Actual Performance. Journal of Analytical Toxicology, 3, 1983 pp177-182

G.J. Shugar, R.A. Shugar and L. Bauman, Chemical Technicians Ready Reference Handbook. McGraw-Hill Book Co. 1978.

BAC Verifeer DataMaster Operator Instruction Manual, WSP Forensic Laboratories Services Bureau, May 1985, pp27-28.

D. Freedman, R. Pisano and R. Purves, Statistics, W.W. Norton & Co. N.Y. 1978.

STATEMENT OF STATE TOXICOLOGIST

In my capacity as Washington State Toxicologist, and by my authority outlined in RCW 46.61.506, I have reviewed this protocol and find it to be proper and adequate in form and substance for the purpose it was intended. I, therefore, approve and authorize its use. This supplements the simulator solution protocol dated 10/23/04, which remains in effect.

/s/ [Illegible] 12/1/05
Barry K. Logan, PhD Date
Washington State Toxicologist

Approved: Date:

/s/ [Illegible] 12/1/05
Barry K. Logan, PhD 3 of 5 Revised 12-05

Reviewed By:/s/ Ann Marie Gordon Date: 12-1-05
Ann Marie Gordon
Laboratory Manager

The following toxicologists have read the Simulator Solution Protocol and agree to follow this procedure as it is written. Any deviations from the procedure must be documented in writing and approved by the laboratory manager and/or the State Toxicologist.

Reviewed By:/s/ Edward Formoso Date: 12/1/05
Edward Formoso
Supervisor

Reviewed By:/s/ Melissa L. Pemberton Date: 12-1-05
Melissa Pemberton
Supervisor

Reviewed By:/s/ [Illegible] Marshall Date: 12/1/05

Reviewed By:/s/ [Illegible] Eakens Date: 12/1/05

Reviewed By:/s/ [Illegible] Date: 12/1/05

Reviewed By:/s/ [Illegible] Date: 12/1/05

Reviewed By:/s/ [Illegible] Date: 12/1/05

Reviewed By:/s/ Paige Long Date: 12/1/05

Reviewed By:/s/ [Illegible] Date: 12/1/05

Reviewed By:/s/ [Illegible] Date: 12012005

Reviewed By:/s/ [Illegible] Date: 12-1-05

Reviewed By:/s/ Melissa L. Pemberton Date: 12-1-05

Approved: Date:

/s/ [Illegible] 12/1/05

Barry K. Logan, PhD

Reviewed By:/s/ Kari Gruendell Date: 12-1-05

Reviewed By:/s/ Date:

Reviewed By:/s/ Date:

Reviewed By:/s/ Date:

Reviewed By:/s/ Date:

Reviewed By:/s/ Date:

Approved: Date:

/s/ [Illegible] 12/1/05

Barry K. Logan, PhD

APPENDIX L
TRAINING OUTLINE
FOR
DATAMASTER AND PBT
OPERATOR BASIC

10/23/04

Approved – Date

[Illegible]
Barry K. Logan, Ph.D.
Washington State Toxicologist

Prepared By

Washington State Patrol
Breath Test Section

* * *

VI. PRINCIPLES OF OPERATION

A. An accurate and reliable breath test requires a good instrument, program and protocol

B. The following are required for an accurate and reliable test.

1. An accepted method of analysis
2. An instrument in proper working order
3. A properly calibrated instrument
4. A deep lung sample of breath from a living human being

* * *

APPENDIX M

IN THE SUPREME COURT IN AND FOR THE STATE OF WASHINGTON

CITY OF FIRCREST, Respondent, v. THEO JENSEN, Plaintiff/Respondent.	)	NO. 76738-6 **ELECTRONIC RECORD TRANSCRIPTION**

Attorney for the Appellant:
Mr. Ted Vosk

Legal Ease Transcriptions
18940 111th Street East
Bonney Lake, WA 98391
(253) 891-3456

[2] MR. VOSK: May it please the court Your Honors, Ted Vosk on behalf of Mr. Theo Jensen. We've had a lot of discussion about the term shall be admissible in section 4A and whether that means evidence absolutely is admitted or whether that's just permissive as in Long. We've got to read the provision as a whole, and section A isn't the only provision that says something shall be admissible or shall not preclude admissibility. Section A says the breath test shall be admissible at trial if this little checklist is satisfied. Section 4C says challenges to the reliability, the accuracy or the functioning of the instrument, all things which even if we said prejudicial aside can cause confusion or misleading of the jury under 403, shall not preclude the admissibility. So first section A says shall be admissible, then section C says and anything you bring up shall not preclude that admissibility. Taken together

that is a mandatory charge. What elevates the evil created . . .

JUSTICE ALEXANDER: Think of an instance where the prima facie showing has been made pursuant to the statute that's passed, and the judge says it's not – not withstanding that it is not admissible under evidence rule 403. Can you think of any case where a judge would not be held to have abused his discretion in so ruling? I think (inaudible) it would be an abuse of discretion to . . .

MR. VOSK: It would be an abuse of discretion for the judge to exercise any discretion once that checklist has been satisfied. Especially – and even if let's say, let's set aside all the other concerns, [3] NIST traceability and everything else, let's say what the defense wants to challenge is one of the things on that little checklist, and we bring in a witness that says such and such cannot be satisfied. And the judge sitting up there, the judge with the witnesses in front of he or she, who can judge the credibility, says you know what, I've got the facts, I've got the witnesses, I can see that this element wasn't satisfied, but you know what, I can't make that call. I have to assume that everything the State's witness said is true even if I believe in my heart of hearts that the evidence shows that it is not.

JUSTICE MADSEN: Who is the trier of fact? The judge?

MR. VOSK: Well for foundational purposes that would be the judge. In – in conducting . . .

JUSTICE MADSEN: If there is – if there is conflicting evidence in foundation the judge is supposed to call it?

MR. VOSK: Well, whenever – whenever a judge at the pretrial stage is making a decision on foundational elements he or she always has evidence in front of him or her to consider, always has witnesses, and always has to make a determination and exercise some discretion as to whether or not those things have been established. And – and here is the thing, it is – it may be a prima facie standard, but they still have to exercise some discretion. And what this, what this statute is saying is, you can't even in satisfying their prima standard, which is very [4] low, you can't even say I know this guy is lying because we have evidence. For instance, let's . . .

JUSTICE JOHNSON: That's not the case here Mr. Vosk, is that your client did not have such evidence? Did you make an offer here? So doesn't it solve your prospective problem if this court construes the statute as they did in Lord I believe, that the judge does have to make – retain discretion in the appropriate case not to allow evidence to be admitted where there is an attack on the foundation? That's a two part question. First is your client, have you got a case before us here that raises that? And second you can share with me, if you want, your thoughts on whether we'll save the statute by construing it to allow the court to exercise its usual evidentiary discretion.

MR. VOSK: With respect to the first question, because the statute has indicated that you have just those elements and that the truth of all of the State's evidence and witnesses must be assumed, it would be a frivolous motion on our part to file anything which would say they are not true, they are not credible because the statute says we don't have – the court doesn't have the power to entertain that argument.

JUSTICE JOHNSON: Well you would have got the same – the same – similar evidence I would have thought would have gone to the trier of fact later anyway in the course of the trial.

MR. VOSK: But the point is that with respect to the separation of powers, the court is supposed to act as the gatekeeper and [5] make sure that the evidence that does get to the trier of fact at the end, that the jury does hear, does at least satisfy some minimum modicum of reliability as required by due process, and in so . . .

JUSTICE JOHNSON: And I do understand that.

MR. VOSK: Okay.

JUSTICE JOHNSON: We have a two part question.

MR. VOSK: Okay.

JUSTICE JOHNSON: Question one, did your client have such a challenge to the evidence? Are you saying that you did not make it?

MR. VOSK: And that's correct Your Honor. It was not made, and for the reason that counsel did not believe she, under the statute . . .

JUSTICE JOHNSON: Was there evidence offered at the trial, if you will, that should or could have been applied to attack the admissibility of the evidence?

MR. VOSK: I believe that is the case Your Honor with respect to a tongue ring.

JUSTICE JOHNSON: What was – oh, it was a tongue ring?

MR. VOSK: Yes.

JUSTICE JOHNSON: Okay. Now on the second half? Do we cure your – my question, do we cure your problem by construing [6] this statute as we did in Lord, or I believe Judge Bridges earlier suggested, it doesn't say admitted it says admissibility. Problem solved?

MR. VOSK: If the court were to determine that this was permissive, yes, but what I think you have to – have to remember is that while the court should read and harmonize the provisions in the statute in such a way as to make them constitutional, it cannot bend and contort the meaning of words and the meaning of a statute to do so. If the clear meaning of the statute is . . .

JUSTICE JOHNSON: But we have Lord as precedent here to construe (inaudible). It doesn't mean admitted. The legislature could have said shall be admitted. Didn't say that.

MR. VOSK: That is correct and that's why Your Honor with respect to that point I say you've got to read the provision as a whole. You've got shall be admissible and then shall not preclude admissibility. So you . . .

JUSTICE JOHNSON: Then you've got subsection C, which you've called my attention to . . .

MR. VOSK: That is correct.

JUSTICE JOHNSON: . . . (inaudible) part of the argument.

MR. VOSK: Okay, and I won't belabor that point Your Honor.

JUSTICE JOHNSON: Okay.

[7] JUSTICE MADSEN: Counsel could you – could you take it out of the context of the statute for a moment and assume that you have a D – DNA test and Frye is met, DNA testing is accepted in the scientific community, and you're really down to the question of well this lab, and the defendant produces some evidence that says, you know. this lab has a history of using dirty instruments and having results that are not corrected. And then the State comes in and says well, you know, maybe they have had in the past, you know. We think that because we've had this double checked or because they've cleaned up their act that this is reliable. Now do you think under our current evidence rules that the judge weighs the evidence as the whether or not the lab uses dirty instruments, or does the judge say well, you know, that kind of goes to the weight of the evidence and so, you know, I'm going to send it to the jury because that is really a jury call. Do you agree with that or . . .

MR. VOSK: I think there is a distinction because the DNA and the DUI and the distinction is this. Under 506(3), the citizens long ago said that there will be certain foundational requirements set out which will establish a valid test, those satisfactory techniques or methods. So we've got a statute. And we also have a State Toxicologist that has recognized certain things as being necessary for a valid and accurate test. So it is not the defense coming in and saying hey look, this is wrong, that's wrong, we found all this stuff that the State doesn't know or whatever. We're saying hey look, this is what the State told us.

[8] JUSTICE MADSEN: Well except if we – if the State is correct that we've taken, that this legislature has no longer delegated that authority to the Toxicologist,

it would – don't we come down to the same place as my DNA?

MR. VOSK: Well no, and because of this, 506(3), as the State indicated, never gave the State Toxicologist any power to determine admissibility. The requirement in 506(3) for a valid test has to do with whether or not the statutes relying on it could ever be applied in the first place. You've got validity, which once that's been satisfied, you've got a statute you can prosecute under and then admissibility which comes secondarily. The reason I think – and that's from Melcher which is cited in our brief. And the reason I think that it's become confused is because we don't have a prior restraint mechanism with respect to charging in a criminal case. We can't jump up there and say no valid test before they've ever brought the charges. And so while – while admissibility is half the question here, and it goes to – it goes to, part of the concern is with respect to separation of powers, the other half is we have statutorily mandated foundational requirements for a valid test and the requirements for the valid test are supposed to be put out by the State Toxicologist and the court is supposed to find that before it ever gets to a jury because if you can't apply the law, if you can't prosecute under the law, what's the jury got to consider? The jury only comes in if we've got a prosecution. [9] I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my skill and ability.

DATED this 26th day of December, 2006 in Bonney Lake, Washington.

/s/ Christine P. Killien
Christine P. Killien